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Reviewing Anti-sodomy Laws in Kenya through an Inclusive Interpretation of Article 45(2) of the Constitution

By

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Declaration

I, **Alex Maina Nyabuti**, do hereby declare that this research 'Reviewing Anti-sodomy Laws in Kenya through an Inclusive Interpretation of Article 45(2) of the Constitution' is my original work. It has not been submitted either in whole or in part to any other institution. It has duly acknowledged other people's used ideas.

Signed at **Pretoria** this **12th** day of **August** **2024.**

Alex Maina Nyabuti

I, **Dr Ayodele Sogunro**, the supervisor, have read this research work and approved it as partial fulfilment of the requirements of the LLM/Masters of Laws in Human Rights (Sexual and Reproductive Rights in Africa) at the Centre for Human Rights, Faculty of Law, University of Pretoria.

Signed at **Pretoria** this **12th** **day of** **August** **2024.**

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Dr Ayodele Sogunro

Dedication

To the sexual minorities, writhing in shackles of marginalisation and discrimination, the dissertation is dedicated to you; it introduces de-marginalisation and anti-discrimination perspectives.

To constitutional law enthusiasts, excavating the meaning of the spirit and text of the Constitution, the dissertation is dedicated to you; it expands the repertoire of interpretative approaches to the subject text.

To the human rights advocates, dedicated to the expansion of frontiers of liberty, equality and human dignity, the dissertation is dedicated to you; it frames non-normative sexualities from human rights prisms.

And to those committed to the decoloniality project, the dissertation is dedicated to you; it unmasks and challenges the enduring colonial constructs that criminalise non-normative sexualities.

Acknowledgement

To this far, God's grace has been sufficient. And thus, the glory goes unto Him. And many have extended hands of support towards my academic journey. Due to space constraints, I wish to mention some, without any particular order.

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To Winrose Ochieng' and Neema Maina, you endured my long nights, and we sometimes became together night owls. You are amazing people. I acknowledge you, with love.

To my late parents, Charles Nyabuti and Eucabeth Nyarangi, you taught me hard work and resilience, hope you smiled with pride from your graves, as I did this.

Last but not least, the rest of my family, mentors and friends – including Naom Nyabuti, John Manoti, Wilfred Nyaundi Konosi, Grace Nyongesa, Robert Mwetich, Justice Bernard Manani, Justice Dr Fred Nyagaka, Dr Charles Moitui, Dr Wycliffe Nyachoti, Seth Anunda and Clinton Kabuthia Kamau – and the many I haven't been able to mention by name, I celebrate you. We made it to the mountaintop! And we've seen the promised land. Together, we shall get there.

List of Abbreviations

ACHPR	African Commission for Human and Peoples' Rights
AIDS	Acquired immunodeficiency syndrome
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CKRC	Constitution of Kenya Review Commission
ECtHR	European Court of Human Rights
ECHR	European Court of Human Rights
FIDA	Federation of Women Lawyers
HIV	Human Immunodeficiency Virus
HRBA	Human rights-based approaches
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KNHRC	Kenya National Human Rights Commission
MSM	Men Having Sex with Men
NCGLE	National Coalition for Gay and Lesbian Equality
NGLHRC	National Gay & Lesbian Human Rights Commission
UN	United Nations
USDS	United States Department of State

Summary

The research problematises the interpretation of Article 45(2) of the Constitution which only recognises marriage between the opposite sex as the stumbling block to decriminalise anti-sodomy laws. It uses doctrinal and qualitative methodology to explore inclusive interpretative approaches within the transformative constitutionalism and queer theoretical framework to augment decriminalisation of anti-sodomy laws. It makes three-pronged findings. First, the existing judicial approaches that cite Article 45(2) of the Constitution to affirm anti-sodomy laws are premised on the colonial and majoritarian heteronormative constructs. Secondly, the approaches deviate from various inclusive interpretative approaches developed within transformative constitutionalism and queer theoretical frameworks as espoused on international, regional and national jurisprudence that has decriminalised ant-sodomy laws. Finally, the research tested the nine inclusive interpretative approaches against Article 45(2) of the Constitution with positive results in reviewing the anti-sodomy laws. It thus recommended that courts embrace decoloniality, draw lessons from comparative jurisprudence and inject a dose of judicial activism to augment inclusive interpretative approaches to decriminalise anti-sodomy laws.

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Chapter 1: Introduction

1.1 Brief background

The Vatican's recent authorisation for Catholic Bishops to bless non-heterosexual couples represents a significant departure from its traditional stance, signaling a move towards inclusivity under Pope Francis's guidance.[1] However, this progressive shift met resistance in Kenya, where Catholic Bishops and societal norms, deeply rooted in heteronormativity and reinforced by religious, cultural, and political institutions, opposed the change.[2] This reaction reflects the ongoing tension between the evolving perspectives within the global Catholic Church and the entrenched conservative views in regions like Kenya, underlining the complex interplay between religious doctrine and societal values.

Kenya is a secular State.[3] Yet, religious and cultural majoritarianism often intersects with political elitism and strategy to glue heteronormativity. A whopping 92% of Kenyans are religious.[4] Christians take the largest pie chunk at 83 % while the Muslims follow with 11 % and the Hindus, Sikhs, and Baha with 2 %.[5] A significant 5% of Kenyans also adhere to various forms of traditional and cultural beliefs.[6] President Moi (deceased) who ruled Kenya from 1978 to 2002 dismissed homosexuality as 'un-African'.[7] His predecessor had

1 The Holy See '*Fiducia Supplicans* on the pastoral meaning of blessings' (2023) 31.
2 M Mwende 'Catholic bishops: No, the Pope did not approve same-sex unions' *The Daily Nation* 20 December 2023.
3 The Constitution of Kenya 2010 Art 8.
4 Pew Research Center *The Global God Divide* (2020) 14.
5 United States Department of State *The 2022 International Religious Freedom Report: Kenya* (2018) 2.
6 As above.
7 R Murray and F Viljoen 'Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union' (2007) 29 *Human Rights Quarterly* 93.

also argued that homosexuality was 'unknown' in his Gikuyu community.[8] In 2013, President Ruto (then the deputy) equated homosexuals to 'dogs' while former Prime Minister Raila urged the police to arrest them.[9] Sogunro theorises this phenomenon as 'political homophobia'.[10] The political elites invoke homophobic sentiments by appealing to social beliefs and morals to consolidate power and legitimacy.[11] The politicisation and religionisation of non-normative sexualities have heightened in Kenya's post-2010 era.[12]

While the heteronormative narrative is innocuous, the problem is when it is used to oppress the non-heterosexual community in Kenya.[13] For instance, non-heterosexual individuals continue to experience harassment from state officers, face familial and societal stigma and exclusion, physical violence and life threats, expulsion from learning institutions, blackmail and extortion, and poor access to healthcare.[14] Their physical and psychological well-being endures negative detriments from being limited to accessing diverse public spaces.[15] Anti-sodomy laws have been weaponised to instil fear and silence non-heteronormative acts.[16] Some non-heterosexual individuals experience police arrests and prosecutions over indecent act charges, without sufficient evidence.[17] Others have

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[8] E Mwangi 'Queer Agency in Kenya's Digital Media' (2014) 57 *African Studies Review* 99.
9 NW Orago and others 'Queer lawfare in Kenya: shifting opportunities for rights realisation' in A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ criminalisation and politicisation* (2022) 120.
10 A Sogunro 'An analysis of political homophobia, elitism and social exclusion in the colonial origins of anti-gay laws in Nigeria' (2022) 22 *African Human Rights Law Journal* 493.
11 n 10 above, 497-498.
12 DS Parsitau 'Law, religion, and the politicisation of sexual citizenship in Kenya' (2021) 36 *Journal of Law and Religion* 105.
13 NM Baraza 'The Impact of heteronormativity on the human rights of sexual minorities: towards protection through the Constitution of Kenya 2010' unpublished PhD thesis, the University of Nairobi, 2016.
14 KNHRC 'The Outlawed amongst us: a study of the LGBTI community's search for equality and non-discrimination in Kenya' (2011) 21.
15 n 9 above,119.
16 n 9 above, 134.
17 Commonwealth Lawyers Association 'The criminalisation of same-sex sexual relations across the commonwealth – developments and opportunities '(2016).

been dismissed from employment based on sexual orientation.[18] These two stories speak volumes. One story involves a gay man who lost a tourism job for 'coming out'.[19] His boss claimed that he was 'destroying the business' by dating another man. His subsequent job application to a catering company was also declined because the company was purportedly 'only looking for straight people.' Another story involves three clergy who were dismissed because the church perceived them as 'gay,' and could not even secure back their jobs even after court intervention.[20]

Unfortunately, the Constitution and Penal Code are applied to instrumentalise and institutionalise heteronormativity, instead of creating an inclusive and pluralistic society. The Penal Code's anti-sodomy provisions criminalise same sex conducts and frame them as follows.[21] First, it classifies the same sex conducts as offences against morality. Secondly, the code constructs them as 'indecent acts' and 'acts against the order of nature.' Thirdly, it conflates consenting male-to-male sexual acts with rape, defilement and bestiality. Fourth, the code criminalises same sex acts and not relationships. Finally, it does not mention 'woman' when criminalising same sexual conducts. It only uses the terms 'person' or 'male person.'

Similarly, Article 45(2) of the Constitution recognises explicitly only heterosexual marriages. It states that 'every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.'[22] Article 45 uses the word 'family' as the marginal note. 'Family' connotes a relationship which is encompassing and inclusive as opposed

18 NGLHRC 'Legal aid clinic summary report' 2014.
19 The Advocates for Human Right and others 'Alternative report to ACHPR's 69th ordinary session on LGBTI Rights' (2021).
20 *JMM, JN & PMW v Registered Trustees of the Anglican Church of Kenya* [2016] eKLR.
21 The Penal Code of Kenya Chapter XV Secs 162, 163 & 165.
22 n 3 above, Article 45(2).

to 'marriage' that is narrow, specific and exclusionary.[23] Inclusive families could include non-heteronormative unions and modern 'non-marital' arrangements such as cohabitation, partnership and co-parenting. Exclusionary marriages often impute unions which are strictly between husband and wife or wives. Article 45(1) of the Constitution constructs 'family' as the 'natural unit of society,' necessary 'basis of social order' and obligates the state to recognise and protect it, including through legislation.[24] Oduor argues that such legislation should recognise modern 'non-marital' families.[25]

In the *Eric Gitari & 7 others v Attorney General* (Gitari II) case, the High Court declined to declare the anti-sodomy laws as unconstitutional citing Article 45(2) of the Constitution.[26] In the *NGO Board v Attorney General & 4 others* (Gitari I, Court of Appeal) decision, the dissenting Court of Appeal judgement affirmed criminalisation of non-normative sexualities based on Article 45(2) of the Constitution.[27] Two Supreme Court dissenting judges in the *NGO Board v Attorney General & 4 others* (Gitari I, Supreme Court) also took a similar approach.[28] It thus emerges that Article 45(2) of the Constitution and sections 162 -165 of the Penal Code have been conjunctively cited to deprive sexual rights for those enjoying same sexual activities based on choice, conscience and association.[29] Other interrelated rights such as equality and non-discrimination, dignity and autonomy,

23 AO Oduor 'Circumventing the sovereign will: the watering down of Article 45 of the Constitution of Kenya 2010 through the Marriage Act 2014' (2023) 19 *The Kenya Law Society Journal* 25.
24 n 3 above, Article 45(1)-(4).
25 Oduor (n 23) 27.
26 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae).*
27 *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* [2019] eKLR.
28 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR).
29 n 3 above, Arts 29, 32, 38 and 45.

privacy and expression, liberty and reproductive healthcare rights have also become the causalities to these breaches or threats of infringement.[30]

A number of cases on judicialisation of sexual minority rights have been litigated. In the *Eric Gitari v Attorney General & 4 others* (Gitari I, High Court) case, petitioner successfully asked the High Court to recognise sexual minorities' rights to form organisations and not be discriminated against based on their sexual orientation.[31] The respondents appealed to the Court of Appeal, where the majority decision affirmed the High Court decision.[32] The respondents again appealed to the Supreme Court, where the majority decision affirmed the High Court's reasoning.[33] Another petitioner invited the High Court to declare sections 162 and 165 of the Penal Code that criminalises sodomy as unconstitutional. A three-judge High Court bench ruled that the sections conform with Article 45(2) of the Constitution.[34] The case is pending appeal. Another petition arose from the criminal trial before the Magistrate Court where the accused were subjected to forced anal examination to fish out evidence for sodomy charges. In the *COL & another v Resident Magistrate - Kwale Court & 4 others* (COL, High Court) case, the High Court held that forced anal examinations were constitutional.[35] In the *COL & another v Resident Magistrate - Kwale Court & 4 others* (*COL, Court of Appeal*) case, the Court of Appeal overturned the High Court decision, reasoning that forced anal medical examination violates constitutional privacy rights.[36]

30 n 3 above, Arts 27, 28, 29, 31 and 43.
31 *EG v Non- Governmental Organisations Co-ordination Board & 4 others* [2015] eKLR.
32 n 27 above.
33 n 28 above.
34 n 26 above.
35 *COL & another v Resident Magistrate - Kwale Court & 4 others [2016]* eKLR.
36 *COL & another v Chief Magistrate Ukunda Law Courts & 4 others [2018] e*KLR.

1.2 Research problem

In the *Gitari II case*, the High Court declined to annul sections 162 and 165 of the Penal Code because Article 45(2) of the Constitution recognises only heterosexual marriages.[37] In the *Gitari I* appeals, the dissenting judges in the Court of Appeal[38] and the Supreme Court[39] reasoned that non-discrimination grounds do not include 'sexual orientation' and therefore, sexual minorities cannot form associations as it would negate the 'family values' reflected under Article 45(2) of the Constitution and anti-sodomy penal provisions. Article 45(2) of the Constitution's interpretation, thus, becomes problematic in decriminalising anti-sodomy laws. It necessitates the need to explore inclusive interpretative approaches to review the anti-sodomy provisions.

Against this background, I problematise the interpretation of Article 45(2) of the Constitution as an impediment to the decriminalisation of anti-sodomy laws through judicialisation. Transformative constitutionalism theory which seeks to introduce large-scale social changes through constitutional adjudicative processes, as well as the queer theory that demystifies sexual binarism provide the research tools to develop inclusive constitutional interpretative approaches to decriminalise anti-sodomy laws.

Transformative constitutionalism could reconstruct Kenya's society based on substantive equality.[40] South Africa and India, for example, have embraced transformative constitutionalism to decriminalise sodomy offences. The queer theory uses a multidimensional approach to appreciate diverse sexual identities and struggles for

37 n 26 above, paras 391, 405.
38 n 27 above, paras 82, 95.
39 n 28 above, paras 109-217.
40 P Langa 'Transformative constitutionalism' (2006) 17 *Stellenbosch Law Review* 352.

dismantling sexual binarism, patriarchy and homophobia.[41] It provides non-hegemonic perspectives for inclusive interpretative approaches.

In the Kenyan context, I find that judicialisation of sexual rights is the most viable option. It has worked out in decriminalising anti-sodomy laws in some African countries like Botswana, South Africa, Mauritius and Namibia. An interpretation of Article 45(2) of the Constitution appears integral in any appeals challenging anti-sodomy laws. A constitutional referendum to repeal Article 45(2) of the Constitution seems an impossibility based on the Kenyan majoritarian heteronormativity.[42] Amending the anti-sodomy laws through the National Assembly also appears remote due to lack of legislative will.[43] Actually, the National Assembly is mooting a new bill that aims to re-criminalise homosexuality.[44]

1.3 Research aims and objectives

The study aims to explore inclusive interpretative approaches to Article 45(2) of the Constitution using transformative constitutionalism and queer theories to augment the decriminalisation of anti-sodomy laws in Kenya considering the country's legal, historical and social backgrounds.

41 F Valdes 'Beyond sexual orientation in queer legal theory: majoritarianism, multidimensionality and responsibility in social justice scholarship or legal scholars as cultural warriors' (1998) 75 *Denver University Law Review* 1409.
42 Baraza (n 13) 8.
43 II Nyarang'o 'The Role of the Judiciary in the Protection of Sexual Minorities in Kenya' unpublished LLM thesis, the University of Pretoria, 2011.
44 The Family Protection Bill (2023).

1.4 Research questions

The study's main question is how to interpret Article 45(2) of the Constitution using transformative constitutionalism and queer theories to decriminalise anti-sodomy laws?

To achieve this, the research is anchored on the following three key research sub-questions.

(a) What is the basis of the existing mechanistic interpretative approaches to Article 45(2) of the Constitution that augments criminalisation of same-sex sexual conducts?

(b) How do the existing narrow interpretative approaches on Article 45(2) of the Constitution deviate from inclusive interpretative approaches developed in the international, regional and national jurisprudence within transformative constitutionalism and queer theoretical framework?

(c) How can the inclusive interpretative approaches developed from the transformative constitutionalism and queer theoretical framework from the international, regional and national jurisprudence be applied on Article 45(2) to decriminalise anti-sodomy laws?

1.5 Research methodology

The study is doctrinal and relies purely on deskwork research. It applies the qualitative methodology to obtain and analyse information from primary and secondary sources. These include various human rights conventions, constitutions and jurisprudence as well as books, peer-reviewed papers and reports. It reviews literature from the transformative constitutional and queer theoretical lenses.

1.6 Significance of the research

The research has a three-prong significance. First, it contributes to decriminalisation of anti-sodomy laws through judicialisation. The relevance of the discussion on inclusive interpretative approaches on Article 45(2) of the Constitution transcends the *Gitari II* case appeal(s). It contributes to the jurisprudence on constitutional interpretation. Secondly, it increases the constitutional interpretation repertoire on Article 45(2) to review anti-sodomy laws. Anti-sodomy laws have been attributed to the negative health and security consequences on non-heterosexual persons arising from stigma and exclusion.[45] Finally, the study contributes knowledge to the literature gap on the subject.

1.7 Literature review and theoretical framework

This segment discusses the literature review as well as the research's theoretical framework. It contains four main sections. Section one reviews the literature on anti-sodomy laws decriminalisation discourse in Kenya. Section two reviews the literature on anti-sodomy laws decriminalisation discourse from other African countries and in the African Human Rights System. Section three reviews the literature on the constitutional approaches within the research's theoretical framework. The final section adverts into the theoretical framework of the research, with two subsections that focuses on transformative constitutionalism and queer legal theories, alongside their critiques and relevance to this research.

45 YB Kakhobwe 'Male sex work and transnational migration: exploring identities practices for survival vulnerabilities and the law in the South African context' unpublished Masters's thesis, the University of Pretoria, 2017.

1.7.1 Anti-sodomy laws decriminalisation discourse in Kenya

In 1997, the play '*Cleopatra*' framed the discourse on 'men having sex with men' (MSM) from healthcare prisms.[46] Although the play, scripted by a priest who received a grant from the German Embassy, perpetuated the myth that HIV/AIDS was a 'Western gay disease,' it had its success story. It influenced the formation of a civil society organisation known as Ishtar, which started linking MSM's healthcare challenges to criminalisation of non-normative sexualities.[47] Subsequently, two court cases amplified the discourse. Francis Odingi was arrested and charged with committing sodomy. He pleaded guilty and the Magistrate Court sentenced him to a 6-year jail term.[48] On appeal, the High Court increased the sentence to 14 years. On the second appeal, the Court of Appeal reduced it to 6 years. [49] Another case involved an intersex inmate who the authorities stripped naked to ascertain his/her sex. The High Court held that the petitioner was subjected to cruelty, ridicule and contempt through exposing his/her 'ambiguous genitalia' without privacy.[50] These two cases, which spilled over to the post-2010 era, did not spur a robust anti-sodomy decriminalisation discourse.

In 2010, the discourse gained momentum during the constitutional review. Media reported that the Committee of Experts on Constitutional Review declined to include gay rights in the draft to purportedly avert public rejection.[51] However, the church and some political elites still maintained their stance against the Constitution for being pro-gay

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[46] C Mugo 'Now you see me, now you don't: a study of the politics of visibility and the sexual minority movement in Kenya' unpublished Master's thesis, the University of Cape Town, 2009.
[47] As above.
48 *Francis Odingi v Republic [2011]* eKLR.
49 *FO case* (n 46) paras 2-8.
50 *R.M v Attorney General & 4 others* [2010] eKLR.
51 n 9 above,113.

rights.[52] They framed homosexuality as 'un-African, unacceptable, a threat to African moral and cultural sensibilities and sensitivities and an affront to African moral and family values.'[53] Yet, their framing collapses when tested against anthropological facts. Murray's work depicts pre-colonial communities across Africa with same-sexual relations: Kenya's Swahili community, Northern Africa's Cushitic communities with 'boy-wives' relationships, Central Africa's cases of 'husband wives,' Angolan's 'men who sexually want both men and women,' Zimbabwe's 'male-to-male' sexual activities among mine workers and Lesotho's 'boy-wives'.[54] Tamale further disabuses the notion that African sexuality is 'homogeneous and unchanging' as unrealistic considering not only the diverse and historically recorded sexual realities in the African context but also the current scholarship suggesting the existence of non-heteronormative African sexualities.[55]

Post 2010, the scholars heightened the anti-sodomy decriminalisation discourse using the new constitutional architecture. Orago and others pitch for judicialisation of anti-sodomy decriminalisation accompanied by sustained advocacy campaigns and public education.[56] Nevertheless, their work lacks the constitutional interpretative approaches that could augment decriminalisation of anti-sodomy laws. Nyarang'o argues for judicial decriminalisation of non-heterosexual relationships based on the 2010 Constitution's envisaged social and legal transformation.[57] Baraza uses transformation and queer theories, among others, to propose judicial and legislative decision-making that

52 n 12 above, 105.
53 As above.
54 SO Murray 'Africa and African Homosexualities: an introduction' in SO Murray & W Roscoe (eds) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998) 1.
55 S Tamale 'Introduction' in S Tamale (ed) *African sexualities: A Reader* (2011).
56 n 9 above, 107, 145.
57 n 43 above.

dismantles heteronormativity, which institutionalises and deprives sexual minorities rights.[58] These works ground the anti-sodomy decriminalisation on the 2010 Constitution's transformative vision. However, they do not explore transformative constitutionalism within the 2010 Constitution. Courtney argues that anti-sodomy laws offend the constitutional rights to equality, non-discrimination, dignity and privacy.[59] Murigu routes for interpretation, application and enforcement of international human rights law and jurisprudence through the new constitutional framework to normalise and implement gay rights.[60] Mutunga uses comparative jurisprudence to argue for decriminalisation of anti-sodomy laws that according to him, offend constitutional rights to individual liberty and equality.[61] Finally, Mukora constructs a 'rainbow' vision by reviewing anti-sodomy laws using the Bill of Rights muster.[62] I find these works commendable but lacking the theoretical frameworks that anchor pluralism, egalitarianism and non-binarism for inclusive interpretative approaches.

The reviewed literature further leads to three conclusions. First, the works are inspired by the 2010 Constitution, and the emerging jurisprudence around sexual orientation. Secondly, they recommend reviewing anti-sodomy laws using human rights. Finally, no single work explores why the High Court affirmed anti-sodomy laws based on Article

58 n 13 above, 29.
59 CE Finerty 'Being gay in Kenya: the implications of Kenya's new constitution for its anti-sodomy laws' (2012) 45 *Cornell International Law Journal* 431.
60 EM Murigu 'Challenges of normalizing and implementing gay rights as part of the international human rights' unpublished Master's thesis, the University of Nairobi, 2011.
61 NK Mutunga 'Inclusion of LGBTQ rights into the bill of rights on Kenya: a pro-gay approach' unpublished LLB thesis, Riara University, 2021.
62 AW Mukora 'Giving rights to the outlawed among us: decriminalising Kenya's anti-sodomy laws' unpublished LLB thesis, Strathmore University, 2017.

45(2) of the Constitution. The Court of Appeal and Supreme Court might adopt the same approach if counter-arguments are not explored.

1.7.2 Anti-sodomy laws decriminalisation discourse from comparative perspectives

Sogunro postulates that Nigeria's sodomy offences are sustained by the State's attitude to human dignity, coupled with its failure to comply with the international human rights framework on dignity rights.[63] He then advances rights-based approaches that give prominence to sexual minorities' dignity. However, this approach could be unsuccessful in Kenya as the problem lies with the interpretation of Article 45(2) of the Constitution. In another work, Sogunro argues that the evolution and enforcement of Nigeria's anti-sodomy laws is engineered by the political elites, using 'political homophobia' as a tool for social exclusion.[64] His prognosis involves conducting advocacy within the democratic processes such as court-actions as well as using the modern theoretical models, which in my view include transformative constitutionalism and queer theories, to address the power dynamics and dismantle the social exclusion hegemonies.[65] Sogunro's theoretical framework is commendable but does not delve into inclusive constitutional interpretative approaches to legal texts like Article 45(2) of the Constitution.

Agada uses Berlin's theory of liberty which centralises 'individual autonomy' for decriminalising anti-heterosexuality legislative pieces in Nigeria to protect and promote human rights.[66] Agada's theoretical framework needs complementary concepts to be

63 A Sogunro 'Deepening the right to dignity of sexual minorities in Nigeria: an analysis of state obligations and responsibilities' unpublished LLM thesis, the University of Pretoria, 2017.
64 A Sogunro 'Advocacy, social control, and the criminalisation of same sex relationships: the evolution and enforcement of antigay laws in Nigeria' unpublished LLD thesis, the University of Pretoria, 2020.
65 n 64 above, 5-13.
66 A Akogwu 'Assessing the human rights implications of the Nigerian law dealing with sexual orientation' unpublished LLD thesis, the University of Pretoria, 2018.

effective in Kenya. Transformative constitutionalism tends to focus on group rights which might provide fodder to develop inclusive interpretative approaches to Article 45(2) of the Constitution, and that could create an egalitarian and pluralistic society that accommodates non-heteronormativity.[67]

The decriminalisation discourse in Uganda Malawi, Botswana and South Africa also provides some comparative insights. Ako conducts a comparative study of these four countries, whose anti-sodomy laws are part of their colonial inheritance.[68] He highlights the religious and cultural narratives criminalising non-heteronormativity and pitches for decriminalisation using a 'universalism' human rights theory as opposed to the concept of 'cultural relativism.' In Kenya, the human rights theory is hampered by Article 45(2) of the Constitution. It is imperative to test the theory against the problematic constitution provision, and also use it to explore inclusive interpretations.

Arguing for decriminalisation of Cameroon's anti-sodomy laws, Nguegna bases his human rights approach on privacy, equality, fair trial, dignity, non-discrimination, access to education and health rights.[69] She uses a multidisciplinary theoretical framework that invokes sociology, anthropology, psychology and science.[70] A multidisciplinary approach could be significant in unearthing the historicity and social dynamics around sodomy laws as explored in this research, through a transformative constitutionalism framework.

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67 EK Karl 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 153.
68 EY Ako 'The Debate on sexual minority rights in Africa: a comparative analysis of the situation in South Africa, Uganda, Malawi and Botswana' unpublished LLM mini-dissertation, the University of Pretoria, 2010.
69 TB Nguegna 'Decriminalising same-sex conduct in Cameroon' unpublished LLM mini-dissertation, the University of Pretoria, 2012.
70 n 69 above, 38-48.

Regarding the African Human Rights System, the discourse is framed from a sexual minority rights perspective. Murray and Viljoen explore how the African Charter on Human and Peoples Rights (African Charter) protects sexual minorities using a three-pronged approach.[71] First, the African Charter's non-exhaustive grounds on non-discrimination open the door for other group characterisations.[72] Similarly, 'sex' could be interpreted to include 'sexual and gender orientation.'[73] Secondly, the African Charter entrenches mutual respect and tolerance as values.[74] These values could create pluralistic societies founded on mutual respect and tolerance towards sexual and gender minorities. Finally, the African Charter allows cross-reference from other international and regional human rights instruments.[75] The jurisprudence on privacy rights under international rights instruments could be incorporated into the African Human Rights system.[76] The Human Rights Committee interpreted privacy to protect sexual orientations under Article 17 of the International Covenant for Civil and Political Rights.[77] Huamusse makes the same argument.[78] These works rely on the international and regional rights framework. They provide comparative interpretive approaches and jurisprudence on human rights that are useful in this research.

71 n 7 above, 93-97.
72 n 7 above,91.
73 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128.
74 African Charter, Art 28.
75 n 74 above, Arts 60-61.
76 n 7 above, 89-92.
77 *Toonen v. Australia* (31 Mar 1994) CCPR/C/50/D/488/1992 (1994).
78 LE Huamusse 'The right of sexual minorities under the African Human Rights System' unpublished LLM thesis, the University of Pretoria, 2006.

1.7.3 Constitutional interpretative approaches to decriminalisation discourse

Few scholarly works exist on constitutional interpretative approaches to the anti-sodomy decriminalisation discourse. Ako argues that the Constitution and international human rights framework can be used to decriminalise anti-sodomy laws in Ghana.[79] Using the decolonial theory, he shows that the African culture was tolerant of non-heterosexuality.[80] He interprets the Ghanaian Constitution using a transformative constitutionalism concept to anchor decriminalising anti-sodomy laws.[81] Ako's arguments on transformative constitutionalism to decriminalise anti-sodomy laws could be tested against Kenya's Article 45(2) of the Constitution.

Wekesa's thesis uses comparative constitutional theory for Kenya and Uganda to decriminalise anti-sodomy laws.[82] He uses non-discrimination, dignity and privacy rights as well as international human rights law and jurisprudence to argue for decriminalisation of homosexuality.[83] While the research does not use it as a theory, chapter four notes that drawing comparative lessons from other jurisdictions is an inclusive interpretative approach. However, the court decisions on same sex conducts from Uganda might be inapplicable to Kenya considering their different constitutional texts on family rights.

Singiza's work contributes to Uganda's anti-sodomy decriminalization discourse through the constitutional interpretation of equality, dignity and privacy rights using the

79 EY Ako 'Towards the decriminalisation of consensual same-sex conduct in Ghana: A decolonisation and transformative constitutionalism approach' unpublished LLD thesis, the University of Pretoria, 2021.
80 n 79 above, 21-23.
81 Ako (n 79) 23-25.
82 SM Wekesa 'A Constitutional approach to the decriminalisation of homosexuality in Africa: a comparison of South Africa, Kenya and Uganda' unpublished LLD thesis, the University of Pretoria, 2016.
83 n 82 above, 229-264.

essentialist and constructionist theories.[84] Kenya's Article 45(2) of the Constitution intertwines 'family' rights with power dynamics and hegemonies on sexualities. A change-oriented theory like transformative constitutionalism appears best suited to reconstruct Article 45(2) of the Constitution for inclusive interpretations.

Finally, Lekgow explores the interpretative approaches that decriminalised Botswana's anti-sodomy offences.[85] He observes that the courts interpreted non-discrimination, dignity and privacy rights generously while interpreting their limitations narrowly.[86] He concludes that constitutional interpretation should consider organic human and societal evolution which is normative while bridging between the past and future.[87] This interpretive approach can be anchored in transformative constitutionalism and queer theoretical frameworks.

1.7.4 Theoretical framework of the research

In this section, I demonstrate how transformative constitutionalism and queer theories ground inclusive constitutional interpretative approaches on Article 45(2) of the Constitution to augment decriminalisation of anti-sodomy laws. As signalled above, transformative constitutionalism theory seeks to induce large-scale social change through constitutionally-grounded political processes, in a non-violent and participatory approach, toward an egalitarian society conscious of its history.[88] It would historicise sodomy offences and develop decriminalising interpretative approaches. Similarly, as

84 DK Singiza 'Exorcising the antiquity spirit of intolerance: possibilities and dilemmas of decriminalising sodomy laws in Uganda' unpublished LLM mini-dissertation, the University of Pretoria, 2007.
85 GR Lekgowe 'A new dawn for gay rights in Botswana: a commentary on the decision of the High Court and Court of Appeal in the Motshidiemang cases' (2023) 67 *Journal of African Law* 477.
86 n 85 above, 4.
87 As above.
88 Klare (n 67) 150.

Valdes argues, the queer theory employs a multidimensional approach to diverse sexual identities and struggles, which I find useful in anchoring inclusive constitutional interpretative approaches that may dismantle sexual binarism, patriarchy and homophobia.[89] The theory would deconstruct sexuality hegemonies underpinning Article 45(2) of the Constitution, and introduce the counter-majoritarian perspectives.

I now proceed to dive into the deeper water ends of transformative constitutionalism and queer theories while illuminating their relevance to this research in the next two subsections.

1.7.4.1Transformative constitutionalism

As observed above, professor Klare theorised transformative constitutionalism as:

> "[A] long-term project of constitutional enactment, interpretation, and enforcement committed (…) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.[90]

Klare extrapolates transformative constitutionalism tenets.[91] According to Klare, transformative constitutionalism aims to ensure substantive equality. It also aims to create a multicultural society that is pluralistic, inclusive and accommodative to diverse sexual and gender identities. It is historically conscious and disruptive to the status quo too. These tenets anchor interpretative approaches like decoloniality, multi-disciplinary, constitutional morality and rights-based approaches based on their focus on historicisation and invoking non-legal phenomenon, normative values of tolerance and

89 n 41 above.
90 n 67 above, 150.
91 n 67 above, 153-156.

accommodation, and substantive equality respectively. Klare also extrapolates that transformative constitutionalism rejects judicial restraint, which in my view, further augments judicial activism in sexual minority rights adjudication.

Klare also critiques the disconnect between the South African Constitution's transformative aspirations and its conservative legal culture.[92] Klare finds that legal texts have apparent and actual gaps, conflicting provisions, ambiguities and obscurities that call for judicial interpretation.[93] Kenya's Constitution also espouses some self-conflicting and contradictions that require judicial interpretations for clarification. Mutunga concurs and makes three observations.[94] First, Kenya's constitution-making was a social and political process, marked by negotiations and compromise, often manifesting through some inconsistencies, contradictions, penumbras and vagueness in the final document. Secondly, constitution-making does not end at promulgation; it continues with its interpretation. Finally, the constitutional texts sometimes fail to properly express the drafter's mind and the people's aspirations, thus, courts must invoke the spirit of the Constitution. In my view, an interpretation within transformative constitutionalism auspices concretises the transformative vision of the Constitution on protecting vulnerable and marginalised communities like sexual minorities.[95]

Githiru rationalises why transformative constitutionalism is relevant in the post-2010 constitutional dispensation in Kenya.[96] First, the Constitution of Kenya is transformative

92 n 67 above, 151.
93 n 67 above, 156-160.
94 W Mutunga 'The 2010 Constitution of Kenya and its Interpretation: Reflections from the Supreme Court's Decisions' (2015) 1 *Speculum Juris* 6.
95 n 67 above, 166.
96 FM Githiru 'Transformative constitutionalism, legal culture and judiciary under the 2010 Constitution of Kenya' unpublished LLD thesis, the University of Pretoria, 2015.

and envisions a new order. Secondly, it creates new contemporary horizons and emerging areas of constitutional contestations that invite interpretation for clarity. Sexual minority rights emerge as one of these contemporary areas of constitutional contestations. When interpreting these contestations, Githiru implores judges to embrace multi-disciplinary approaches that appreciate non-legal phenomena and incorporate the constitutional values and norms to shun formalistic and mechanistic interpretative approaches. Her arguments augment multi-disciplinary and constitutional morality interpretative approaches that this research considers inclusive.

South Africa and Kenya are wriggling from conflicts and historical injustices sowed by apartheid and colonialism, and thus, promulgated post-liberal constitutions to break away from the abusive past.[97] The post-liberal and transformative constitutions, Githiru argues, require progressive and multi-disciplinary approaches that nurture indigenous jurisprudence. Her arguments again anchor multidisciplinary and decoloniality as inclusive interpretative approaches to Article 45(2) of the Constitution, and also to deconstruct the inherited colonial and traditional legal regimes while invoking non-legal phenomenon such as socio-economic and cultural issues.[98]

Nevertheless, there have also been criticisms of transformative constitutionalism. For instance, Roux criticises transformative constitutionalism for blurring the law-politics divide.[99] Kibet and Fombad caution that judges descending into the policy-making arena may undermine judicial legitimacy.[100] Sibanda laments that transformative

97 n 96 above, 178.
98 n 96 above, 176-177, 198, 204.
99 T Roux 'Transformative constitutionalism and the best interpretation of the South African Constitution: distinction without a difference?' (2009) 2 *Stellenbosch Law Review* 260.
100 E Kibet & C Fombad 'Transformative constitutionalism and the adjudication of constitutional rights in Africa' (2017) 17 *African Human Rights Law Journal* 340.

constitutionalism makes courts the sites of contestation, plunging them into constitutional politics.[101] According to him, the theory privileges courts through counter-majoritarian and constitutional supremacy, yet court actions have their shortcomings like litigation costs.[102] Much as I concur that transformative constitutionalism generates counter-majoritarianism, Sibanda's critique fails to appreciate that counter-majoritarianism can protect sexual minorities who lack legislative numbers to influence laws that protect them. In another work, Sibanda critiques transformative constitutionalism theory as an insufficient cure for widespread poverty and inequalities.[103] Michelman debunks these criticisms by pointing out that South Africa has advanced in the human rights, rule of law and constitutionalism spheres.[104] This research finds South Africa to have made jurisprudential milestones on decriminalisation of private consensual non-heterosexual conducts,[105] including the validation of non-heterosexual marriages,[106]and adoption of children by non-heterosexual couples through transformative constitutionalism.[107] Similarly, India has decriminalised homosexuality[108] using transformative constitutionalism theory.[109] I thus concur with Ghosh that transformative constitutionalism has not only decriminalised and restored liberty to non-heterosexual individuals, but also dismantled the definition of marriage and religious

101 S Sibanda 'When do you call time on a compromise? South Africa's discourse on transformation and the future of transformative constitutionalism' (2020) 24 *Law, Democracy & Development* 384.
102 n 101 above, 404.
103 S Sibanda 'Not purpose-made! transformative constitutionalism, post-independence constitutionalism and the struggle to eradicate poverty' (2011) 22 *Stellenbosch Law Review* 482.
104 F Michelman 'Liberal constitutionalism, property rights, and the assault on poverty' (2011) 22 *Stellenbosch Law Review* 706.
105 *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC).
106 *Minister of Home Affairs & Another v Fourie & Another* [2005] ZACC 19.
107 *Du Toit & Another v Minister of Welfare and Population Development & Others 2003* (2) SA 198 (CC).
108 *Navtej Singh Johar v Union of India* 2018 (10) SCC 1.
109 N Ghosh 'Transformative constitutionalism and rights of homosexuals in India and South Africa: a comparative study" (2021) 3 *CMR University Journal for Contemporary Legal Affairs* 166.

traditions that excluded non-heterosexuals, recognised non-heterosexual unions and accorded them with benefits available to heterosexual couples.[110] Considering its jurisprudential impact on sexual rights in South Africa and India, I find that transformative constitutionalism outweighs its criticisms.

Using Fombad and Kibet's work, I summarise the transformative constitutionalism as follows.[111] Transformative constitutionalism is conscious of the social and political prevailing realities as well as its historicity. When historicising legal texts and contexts, an 'open-ended' approach that transcends the narrator's subjectivities is appropriate.[112] The approach cures revisionism, biases and selectivity. Transformative constitutionalism also shuns formalism and positivism to maximise the enjoyment of rights. Additionally, it is driven by value-based constitutional interpretation and enforcement of rights. It appreciates the courts' duty to 'develop the law to conform it' with the Constitution. Langa agrees that the post-liberal Constitution's transformative ideals oblige courts to change laws to conform with the rights and values of the Constitution.[113] Finally, transformative constitutionalism advances substantive rights on sexual minority issues, regardless of the prevailing majoritarian attitudes and prejudices. All these features anchor inclusive interpretative approaches such as decoloniality, multi-disciplinary, rights-based approaches, constitutional morality, constitutional speaks, constitutional-conforming and counter-majoritarianism that could decriminalise anti-sodomy laws.

110 n 109 above,175-179.
111 n 100 above, 350 -361.
112 P de Vos 'A bridge too far? History as context in the interpreting the South African Constitution' (2001) 17 *South African Journal on Human Rights* 1.
113 n 40 above, 351.

Similarly, the invitation for courts to develop laws in conformity to the constitution and shun formalist approaches in my view also requires some form of judicial activism.

Transformative constitutionalism envisions a society based on ideals of justice and substantive equality, values of freedom and dignity;[114] a society where people live in dignity irrespective of social differences.[115] Additionally, it also imagines a society that appreciates dialogue and contestation as well as unpredictable but constant change.[116] In my view, such a society must be an egalitarian, heterogenous and pluralistic society that also accommodates sexual diversity.

1.7.4.2 Queer legal theory

Epprecht proposes queer theory for an analysis of African sexualities.[117] Queer theory champions human autonomy and dignity while critiquing essentialism.[118] Essentialism considers sexual orientation and gender identities as innate and natural traits.[119] It originates from biological studies on sexuality, genes and hormones. Essentialism underpins patriarchy and masculinity that sometimes privileges heterosexuality. Queer theory resists these essentialised narratives that fortify binarised gender and sexualities in society. As Valdes observes, gender and sexualities can be social constructs of binary categorisation, but I disagree when he claims that gender and sexualities are neither

114 A Katsiginis and C Olivier 'An [un]making of the world: a postcolonialism response to transformative constitutionalism' (2014) 8 *Pretoria Student Law Review* 1.
115 DV Grootboom 'The right of access to housing and substantive equality as contextual fairness' (2001) 17 *South African Journal of Human Rights* 265.
116 Langa (n 113) 354.
117 M Epprecht 'Sexuality, Africa, History' (2009) *114 The American Historical Review* 1258.
118 D Banović 'Queer legal theory' in D Vujadinović and others (eds) *Feminist Approaches to Law: Theoretical and Historical Insights* (2023) 73.
119 FJ Sánchez & T Pankey 'Essentialist views on sexual orientation and gender identity' in KA DeBord et al (eds) *Handbook on Sexual Orientation and Gender Diversity in Counselling and Psychotherapy* (2017) 51.

natural nor predetermined.[120] I do not think that the queer theory's anti-essentialism disputes the possibility of some gender and sexuality aspects being innate. Rather, it disputes the framing of gender and sexuality only from natural and pre-deterministic approaches. In other words, queer theory celebrates diverse identities and cultures beyond essentialist and constructionist binary identities.[121]

On its approaches to the law, queer legal theorists consider the objectives of laws as regulating rather than liberating.[122] For instance, the laws on sexuality often reinforce the binary homo-heterosexual social constructs.[123] In this context, they argue that the vision of laws is to sustain the heteronormative status quo.[124] Queer legal theorists further frame the law as a 'powerful textual practice' that is often exclusivist and disconnected from reality.[125] Finally, they dispute the law as 'objective' and 'neutral.'[126]

I agree with queer legal theorists that laws often reflect conservative heteronormative majoritarian social dispositions. It thus calls for non-hegemonic approaches such as multi-disciplinary, decoloniality and counter-majoritarian to liberate sexual minorities. Snyman and Rudman provide two insights on how queer theory could be applied in relation to the interpretation of rights.[127] First, the theory can contribute to inclusive application of the law to treat all individuals as equal subjects, regardless of sexual

120 n 41 above, 98.
121 I Morland & A Willox 'Introduction' in I Morland & A Willox (eds) *Queer Theory* (2005) 3.
122 Chamallas *Introduction to Feminist Legal Theory* (2012).
123 N Bamforth 'Critical approaches to sexuality and law' (1997) 24 *Journal of Law and Society* 306.
124 n 123 above, 307.
125 Bamforth (n 123) 309.
126 Banović (n 118) 1.
127 T Snyman & A Rudman 'Protecting transgender women within the African Human Rights System through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence' (2022) 33 *Stellenbosch Law Review* 57

orientations and gender identities.[128] Secondly, it can dismantle the colonial binary heteronormative boundaries inherited by African communities.[129] I agree with these arguments, and further propound that the queer theory can expose the sexuality hegemonies underpinning Article 45(2) of the Constitution by introducing the inclusive approaches. Sheik argues that India's High Court annulled anti-sodomy laws to foster inclusiveness and tolerance using the queer theory.[130]

Nevertheless, McCormick critiques the same-sex union recognition in South Africa using the queer theory.[131] She argues that normalisation of homonormativity hegemonises only gays and lesbians, excluding other non-normative sexualities. Her research data shows that same-sex marriages are influenced by 'choice-love-respectability-benefit' reasoning, which all have legal, social, cultural and religious ramifications.[132] Based on this, McCormick critiques the legal recognition of same-sex marriages for intensifying normalisation of homonormativity.[133] Homonormativity resulting from same-sex marriage normalisation, she argues, could further exclude the non-married, single, divorced, uninterested and non-monogamous. Additionally, she argues that homonormativity shifts 'sexual freedom discourse' to recognition of gay and lesbian marriages and partnerships that excludes queer persons as sexual subversives. Her queer theorised arguments are significant in searching for inclusive interpretative approaches to decipher the meaning of 'marriage' and 'family' under Article 45 of the Constitution.

128 n 127 above, 65.
129 As above.
130 D Sheikh 'The road to decriminalisation: litigating India's anti-sodomy Law' (2013) 16 *Yale Human Rights and Development Law Journal* 104.
131 T McCormick 'A critical engagement? Analysing same-sex marriage discourses in to have and to hold: the making of same-sex marriage in South Africa (2008) – A queer perspective' (2015) 46 *Stellenbosch Papers in Linguistics Plus* 99.
132 n 131 above, 104-111.
133 As above.

Oduor's article already critiques parliament for construing 'family' narrowly and excluding non-normative marital unions.[134]

1.8 Chapters overview

Chapter one provides the background of criminalised non-normative sexualities, together with its challenges. It also demonstrates how the Constitution and Penal Code institutionalises non-heteronormativity. It illustrates the sexual minority's judicialisation and problematises Article 45(2) of the Constitution in decriminalising anti-sodomy laws. Furthermore, it provides the research objectives, questions and significance and reviews the literature review and also critically discusses and lays the research's theoretical framework.

Chapter two explores the basis for the current judicial interpretations and contains four parts. Part one revisits the history of anti-sodomy laws in Africa, and finally Kenya. Part two dissects Article 45 of the Constitution, with its historical perspectives. Part three concludes with the basis of some existing judicial approaches. Part four draws tentative conclusions.

Chapter three explores how the current judicial approaches to Article 45(2) of the Constitution deviate from the inclusive approaches within transformative constitutionalism and queer theories. It explores the international and regional jurisprudence decriminalising anti-sodomy laws before turning national courts. It then draws a contrast to the existing interpretative approaches to Article 45(2) of the Constitution.

134 n 23 above, 25.

Chapter four applies nine inclusive interpretative approaches on Article 45(2) of the Constitution to decriminalise sodomy offences. The approaches are the human rights-based approach, multi-disciplinary approach, hierarchisation of constitutional and human rights norms, constitutional morality, decoloniality notion, counter majoritarianism, constitutional speaks, constitution-conforming and comparative lessons.

Chapter five discusses the research findings, conclusion and recommendations.

Chapter Two

Historical Perspectives on Article 45 of the Constitution and Anti-sodomy Laws

2.1 Introduction

When it comes to reviewing anti-sodomy laws by using the existing constitutional and human rights frameworks, judicial institutions confront three challenges. First, the institution is required to address the question as to which interpretative approach is inclusive. Secondly, it is required to establish a sound theoretical framework to anchor its interpretative reasoning on. Finally, it becomes necessary for the judicial institution to address the historical antecedents of laws proscribing against anti-sodomy, and devise inclusive interpretative approaches using sound theoretical frameworks. Having problematised Article 45(2) of the Constitution as the stumbling block to decriminalisation of anti-sodomy laws through court actions, the previous chapter proposed transformative constitutionalism and queer theories as the theoretical framework to augment inclusive interpretative approaches. As a prognosis step, this chapter seeks to establish the basis of the existing narrow interpretative approaches on Article 45(2) of the Constitution that affirm anti-sodomy laws from historical perspectives. To achieve this, the chapter is broken into four parts. It first historicises anti-sodomy laws by tracing how Britain exported 'sodomy' offences to Africa, and then Kenya. It secondly adverts to Article 45(2) of the Constitution while providing its historical perspectives from the constitutional-making process. Third, it situates the basis for Kenya's judicial interpretations within these historical contexts. The conclusion summarises the findings. With this, the chapter expects to find historical and religious antecedents underpinning the current judicial interpretations. The chapter's findings

further lay the basis for the discussion in the next chapter focusing on the inclusive interpretative approaches from comparative jurisprudence.

2.2 Historical antecedents of anti-sodomy laws

Formal statutes criminalising private and consensual adult same-sex never existed in pre-colonial Kenya. However, non-normative sexualities and unions existed. In his childhood, Mutua witnessed a 'man-to-man' union in the Kamba community but the subject was discussed discreetly.[1] As a millennial growing up in a rural Christian set-up, this author confirms that indeed 'sex' and 'sexuality' were rarely discussed. 'Women-to-women' marriages also existed among the Kamba, Kisii, Nandi, Kikuyu and Kuria communities.[2] Anthropological studies also reveal that same-sexual activities existed among the Swahili community in the Kenyan Coastal region.[3] Anti-sodomy statutes that criminalise same sex conducts were imposed in Africa, and then in Kenya, during colonialism.

2.2.1 Colonial origins of anti-sodomy laws in Africa

In the 20th Century, Britain and France exported anti-sodomy laws to Africa through colonialism. Although France had decriminalised consensual and private same sex conduct in 1789, it re-introduced them in its colonies like Benin, Cameroon and Senegal

1 M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale *African Sexualities* (2012) 452.
2 MW Kareithi 'A Historical-legal analysis of woman-to-woman marriage in Kenya' Unpublished LLD thesis, University of Pretoria, 2018.
3 SO Murray 'Africa and African Homosexualities: an introduction' in SO Murray & W Roscoe (eds) *Boy-Wives and Female Husbands: Studies of African Homosexualities* (1998) 1.

as a means of social control.[4] In contrast, Britain imposed anti-sodomy laws on all of its colonies. It behoves this research to excavate the evolution of anti-sodomy laws in Britain.

During the Medieval Ages, Christianity religion influenced the Roman Empire to incorporate the death penalty for male-male sexual activities into Roman Laws.[5] In 1290 and 1300, the punishment was enhanced to 'burning' through the *Fletta* and *Britton* Treaties respectively. Starting from Europe, the State and Church became entangled, forming the 'Roman Theocratic Empire.'[6] It spread its tentacles, far and wide, including to North Africa.[7] Britain became part of the Roman Empire. The Roman Laws evolved into Ecclesiastical Laws, reinforcing their Judeo-Christian constructs. Michael observes that the Church Courts punished Ecclesiastical Offences, which included sodomy, for three reasons.[8] First, the anti-sodomy laws enforced social purity and punished those who endangered the Christian principles of founding the 'Roman Theocratic State.' Secondly, the anti-sodomy laws protected the citizens from being 'defiled' by sodomy practices, which disturbed the racial or religious order of things in the Roman theocracy. Finally, sodomy offences were driven by the disapproval of non-procreational sex. As fate would have it, the 'Roman Theocratic State' collapsed due to politics and Protestant Reforms. Britain became secular and codified the Buggery Act in 1534, framing it as an abominable vice, thus reinforcing the Judeo-Christian antecedents.[9]

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4 Human Rights Watch 'This alien legacy of the origins of sodomy laws in British colonialism' (2013) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* 1.
5 L Crompton *Homosexuality and Civilization* (2003) 34.
6 MH Eichbauer 'The shaping and reshaping of the relationship between church and state from late antiquity to the present: a historical perspective through the lens of canon law' (2022) 13 *Religions* 378.
7 M Meredith *The Fortunes of Africa: A 5,000-Year of History of Wealth, Greed and Endeavor* (2014).
8 DK Michael 'The offence of sodomy: England's least lovely criminal law export?' (2011) *The Journal of Commonwealth Criminal Law* 1.
9 DE Sanders '377 and the Unnatural afterlife of British colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* 1.

Fast forward to 1803, Britain started its colonial adventure at the dawn of imperialism. India was one of its stops. It established the Indian Law Commission (ILC) under the tutelage of Lord Macaulay to draft the Indian Penal Code (IPC).[10] Human Rights Watch (HRW) discusses the evolution and purposes of the IPC as follows.[11] The IPC started as a 'colonial experimentation' to systemise its scattered and unwritten laws. It incorporated its sodomy offences to prevent the British colonialists against 'moral infection' from the local communities and as 'moral reforms' to 'christianise' the native norms. By 1860, the ILC had grafted the sodomy offence from the 1534-Buggery Act and modified it into section 377 of the IPC. It was classified as 'carnal knowledge against the order of nature.' Section 377 then evolved through the interpretative periods which HRW christens as 'silence injunction,' 'consent-and-non-consent axis' and 'exploration of meanings' to disregard consent and age in sodomy offences. It now conflated homosexuality with rape and defilement. Further legislative reforms and revisions introduced 'gross indecency' offences to net non-penetrative sexual acts and private acts. In 1885, back in Britain, Parliament also introduced 'gross indecency' offences through amendments, whose basis was 'social purist morals' that sought to control male-male sexual lust and confine sex only within heterosexual marriage.[12] In 1861, the British parliament enacted the *Offences Against Persons Act* (OAPA) which criminalised consensual same-sex conducts in private but reduced its death penalty to life imprisonment.[13] In 1899, Britain drafted the Penal

10 n 9 above, 10.
11 n 4 above, 15-22.
12 Sanders (n 9) 15-16.
13 HRW (n 4) 15.

Law of Queensland (PLQ) in colonised Australia.[14] Unlike the IPC, the PLQ modified its anti-sodomy laws from the OAPA but reduced the life imprisonment to fourteen years.[15]

At this point, Britain had a strong grip on Africa and Asia through colonialism. It imposed the codes on Asia, Canada and Africa. African countries adopted the IPC or PLQ according to power-plays, preferences and whims.[16] Some other African countries criminalised non-heterosexual conducts through the influence of *Sharia* law based on the Islamic religion, one of the Judeo-Abrahamic faiths.[17]

After the World War II, Britain gravitated towards liberalism. It established the Wolfenden Committee that recommended 'private morality' to be outside criminal law.[18] The works of Bentham and Mills also contributed to decriminalisation of sodomy offences.[19] In 1967, sodomy offences were decriminalised in England and Wales.[20] By 2001, Britain decriminalised anti-sodomy laws in Scotland[21] and Northern Ireland through judicialisation.[22] In 2007, Britain committed before the United Nations to decriminalise anti-sodomy laws overseas.[23] In 2017, it pardoned convicts of homosexual offences.[24]

14 Sanders (n 9) 12.
15 HRW (n 4) 22.
16 HRW (n 4) 15.
17 Michael (n 58) 7.
18 Sanders (n 9) 25.
19 As above.
20 HRW (n 4) 7.
21 *Dudgeon v United Kingdom* (1981) ECHR.
22 *Norris v Republic of Ireland* (1988) ECHR.
23 Sanders (n 9) 29.
24 Policing and Crimes Act, 2017 (UK).

2.2.2 Kenya's anti-sodomy laws

In 1930, the British imposed the Penal Code to Kenya. Some consider the Penal Code as a graft from the IPC.[25] However, it is almost non-contentious that its anti-sodomy provisions bear similarities with the PLQ.[26] I also establish that sections 162, 163 and 165 of Kenya's Penal Code have been grafted from the PLQ. These sections criminalise non-heterosexual conduct regardless of age, consent and privacy. They construct same-sex activities as an 'indecent act', 'unnatural' and 'acts against the order of nature.' Further, the anti-sodomy provisions classify homosexuality in the same way as bestiality. By implication, this conflates homosexuality with sexual violence such as rape and defilement. Finally, it criminalises same-sex activities and not relationships.

Anti-sodomy laws appear moribund and redundant. Only one conviction has been reported. It relates to the *Francis Odingi v Republic* (FO) case involving the accused who had faced sodomy charges before the Magistrate Court and was sentenced to 6 years in jail upon pleading guilty.[27] On appeal, the High Court increased it to 14 years but the Court of Appeal reduced it to 6 years.

In the *COL cases* discussed in chapter one, the two suspects faced homosexuality-related charges. The trial court allowed them to undergo forced anal examination to fish out evidence. While the High Court 'sanitised' the forced anal examination, the Court of Appeal found it unconstitutional and quashed sodomy charges before the Magistrate Court.[28]

25 HRW (n 4) 21.
26 Sanders (n 9) 12. Michael (n 8) 12. HRW (n 4) 21.
27 *Francis Odingi v Republic [2011]* eKLR.
28 *COL & another v Chief Magistrate Ukunda Law Courts & 4 others [2018]* eKLR.

2.3 Article 45 of the Constitution

Kenya's 1963 Constitution (repealed) was negotiated by African elites and drafted in Britain.[29] These elites dismembered it through amendments inspired by political expedience. The once-emasculated civil groups began voicing alternative claims for constitutional reforms after three decades of post-independence. It evolved into calls for a new constitution.[30] In 1998, the Constitution of Kenya Review Commission (CKRC) was formed to lead the constitution-making process.

A contestation over homosexuality ensued during the first constitutional review conference.[31] One speaker seemed to argue that public officers should not be involved in 'homosexual immorality' that negates public morality.[32] Another speaker critiqued the 'American traditional liberal' notion that lumps-up blacks, lesbians, gays and gypsies as minorities, when 'being gay is behaviour, and race is not.'[33] However, a different speaker reframed homosexuality as one of the evolving societal ideas.[34] The issue of non-normative sexualities, thus, attracted divergent views from the onset. This demystifies the enduring notion of homogeneous views on non-heterosexuality in Kenya.

In 2003, the CKRC made a recommendation from the collected views on family rights.

29 G Muigai *Power, Politics and Law: Dynamics of Constitutional Change in Kenya 1887-2022* (2023).
30 n 29 above.
31 Constitution of Kenya Review Commission Report *Volume Five Technical Appendices: Part One* (2003).
32 VG Simiyu 'Ethics and Ideology in a Constitution' in CKRC Report (n 31) 130.
33 F Maalim 'Constitutionalization of the Rights of Minorities and Marginalized' in CKRC Report (n 31) 22.
34 FRS De Souza 'Building on the Lancaster House Experience' in CKRC Report (n 31) 247.

> 'A general provision on the importance of the family, equal rights to marry, and in marriage, and the general duties of family members towards one another would reflect the concerns of Kenyans.[35]

The excerpt suggests that Kenyans appreciated marriage within the family's flexible and encompassing context discussed in chapter one. They were not concerned with marriages forms but 'equal rights to marry' without distinction, and this could include heterosexual and queer unions. In any case, women-to-women marriages existed in Kenya.

In 2005, the final CKRC report recommended a three-featured family clause seeking to recognise all marriages including traditional forms, seeking to recognise only heterosexual marriages and finally, seeking to outlaw same sex unions.[36] A delegate's proposal corroborates this.[37] But these excerpts provide the context to the above recommendations:

> 'Some delegates feared that this provision may permit homosexual marriages since the draft Constitution did not specify that marriage can only take place between persons of the opposite sex' and thus, the Steering Committee Consensus Building Group recommended that 'marriage could take place only between persons of the opposite sex'.[38]

> 'a number of delegates were concerned with the Draft Bill of 2002 no clear definition on same sex marriages as opposed to "woman to woman" marriages under customary practices'[39]

35 Constitution of Kenya Review Commission Report *Volume One: The Main Report* (2003) 199.
36 Constitution of Kenya Review Commission *The Final Report* (2005) 120.
37 CKRC (n 36) 672.
38 CKRC (n 36) 401.
39 CKRC (n 36) 421.

The words 'some' and 'a number of' in reference to 'same-sex marriages' connote opposing views among the delegates. While 'a number of delegates' opposed same-sex marriages, they seem unopposed to customary 'woman-to-woman' marriages. A significant observation is that Article 45(2) of the Constitution does not *'outlaw same sex union'* as CKRC recommended. In *Gitari II case*, the High Court fails to appreciate this.[40] I do not find avoiding to outlaw same sex unions accidental. It imputes a sort of 'compromise' between opposing views on the issue. An expanded interpretative approach that appreciates the compromise 'not to *outlaw or prohibit same sex unions'* cannot again use Article 45(2) of the Constitution to affirm anti-sodomy laws. In this context, the High Court's reasoning that decriminalising sodomy would 'open the door for unions among persons of the same sex' is untenable.[41] An inclusive interpretation appreciating the compromise would accommodate customary women-to women marriages, which attracted less contention, but seems to have been lost in the labyrinth of opposing viewpoints on same-sex marriages.

In 2010, the Committee of Experts drafted the new Constitution. Article 8 of the Constitution was entrenched to make Kenya a secular state because Kenyans considered that 'religion is one the values that separate them.'[42] In this sense, any uniform application of religious standards and values becomes divisive and constitutionally unsound. As discussed earlier, the social aversion and values against non-normative sexualities are influenced by the Judeo-Abrahamic religions. The *Gitari II decision*'s reasoning that Article 45(2) of the Constitution carries 'social values' could, thus, be demystified as the

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[40] *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)* paras 390-391.
41 n 40 above, para 397
42 Committee of Experts on Constitutional Review *The Final Report* (2010) 137-138.

indirect imposition of separationist religious views, the mischief that Article 8 of the Constitution cures.[43] Similarly, it shows the need for courts to appreciate that the State is secular when interpreting Article 45(2) of the Constitution and embracing constitutional morality as an inclusive interpretative approach. In acknowledging God, the Constitution neither creates a theocratic state nor subdues citizens to singular religious beliefs.[44] It rather constructs God as accommodating and tolerant.

2.4 Existing judicial interpretative approaches on anti-sodomy laws

In the discussed *FO case*, the High Court increased the sentence to its maximum, without compelling factors.[45] The Judge's approach to section 162 of the Penal Code was mechanical and formalistic. He disregarded mitigating factors, thus, exposing *judicial homophobia*.

In the discussed *COL case*, the High Court 'sanitized' forced annal examination, and made the following curious observation:

> '(n)either the mouth nor the anus is a sexual organ. However, if modern man and woman have discovered that these orifices may be employed or substituted for sexual organs, then medical science or the purveyors of this new knowledge will have to discover or invent new methods of accessing those other parts of the human body even if not for purposes of medical forensic evidence, but also curative medical examination.[46]

43 n 40 above, para 397.
44 The Constitution of Kenya, preamble.
45 n 27 above.
46 *COL & another v Resident Magistrate - Kwale Court & 4 others [2016]* para 47.

The Judge's reasoning is anchored on a historical construct of 'sex' from a 'penetrative, procreational and heterosexual' Judeo-Christian perspective. It also reflects the State's obsession with invasively controlling people's bodies.

The Court of Appeal's dissenting judge in the *Gitari I case* reasoned that the Constitution's Article 45(2) and the Penal Code's Sections 162, 163 and 165 protect 'family values.'[47] In the Supreme Court, two dissenting judges expressed similar views.[48] Invoking section 377 of the IPC, Justice Ouko opined that 'any person in our Code, by parity of reasoning, would similarly extend to woman' while referring to section 162.[49] Justice Ibrahim concurred that section 162 'can be used to prosecute both men and women who are in same-sex relationships.'[50] Citing the constitutional-making history, the Judges reasoned that Article 45(2) of the Constitution reflected the people's will to shield the marriage institution from homosexuality.[51] Three observations suffice. The Supreme Court's dissenting judges borrowed from the IPC, without appreciating its historicity and the need to decolonise it. They also fail to appreciate the compromise on Article 45(2) of the Constitution of 'not outlawing same sex unions.' They linearly approached history, thus, stifling non-heterosexual voices. Finally, the Court of Appeal's dissent was made in the context of 'deep-seated constitution, moral and religious ideologies.'[52] Moral and religious ideologies in Kenya are mostly influenced by Judeo-Abrahamic faiths.

In the *Gitari II Case*, the High Court used the Black Dictionary and foreign precedents to find that 'carnal knowledge' and 'order against nature' mean sexual intercourse and

47 *Non-Governmental Organizations Co-Ordination Board v EG & 5 others [2019]* paras 82, 95.
48 *NGOs Co-ordination Board v EG & 4 others; Katiba Institute [2023]* paras 100-207.
49 n 48 above, para 190.
50 n 48 above, para 102.
51 n 48above, paras 115-122, 219.
52 n 40 above, para 84.

penetrative sex. [53] It held that the Penal Code is non-discriminative since 'any male' phrase in section 165 shows that parliament did not target any group, whether heterosexual or non-heterosexual.[54] The judges claimed that no evidence was adduced on how sections 162 and 165 infringe health, fair hearing, security of person and conscience rights.[55] Finally, it held that although sections 162 and 165 may violate dignity and privacy rights, their decriminalisation would contravene Article 45(2) of the Constitution.[56]

I characterise the High Court decision as follows. First, the court adopted a black-letter and narrow approach. It unquestioningly embraced the constructs of sex as only penetrative and for procreation. Secondly, the court mechanically failed to consider that anti-sodomy laws pose *violative threats* to rights if enforced. It unreasonably insisted on violative evidence. It failed to appreciate the discriminative effect of anti-sodomy laws. Thirdly, the court failed to historicise and decolonialise anti-sodomy laws. Finally, the court became captive to public morality. It expressed apprehension that decriminalising anti-sodomy laws 'would indirectly open the door for unions among persons of the same sex.'[57] It observed Article 45(2) of the Constitution reflects 'social values' and a 'majoritarian view' which pervades the private and public divide.[58] The reasoning is based on Judeo-Christian and Victorian morals that construct marriage as monogamous and heterosexual, bestowing state's duty to protect it from 'pollution.'

53 n 40 above, paras 270-273.
54 n 40 above, paras 295- 297.
55 n 40 above, paras 307-322.
56 n 40 above, paras 392-405.
57 n 40 above, para 397.
58 n 40 above, paras 402 -405.

Some conclusions can be made on the existing judicial interpretative approaches to Article 45(2) of the Constitution and anti-sodomy laws. One interpretative approach views the same sexual conducts as sodomy. 'Sodomy' emanates from Christian theology in the 11th Century.[59] It defined 'sodomitic vice' as sin against nature.[60] It is also traceable to the Jewish narrative; of Sodom and Gomorrah.[61] The Book of Genesis records that God burned Sodom and Gomorrah because of homosexual sin. 'Buggery' has Orthodox Christian origins on 'heretics' which includes some sexual sins.[62] In other words, this 'sodomy' approach is derivative from the religious texts and historical contexts, depicting colonialism and coloniality.

Another interpretative approach protects marriage values and majoritarian views. As the works of Michael, Sanders and HRW discussed above suggest sodomy offences aimed to cushion Europe from 'moral infection, contamination and pollution, and Christianise' the natives. Kenya's courts are apparently protective on of the heterosexual marriage institution, particularly from the contamination of non-heterosexuality which reflects coloniality and its constructs.

Other interpretative approaches also construct sex from procreational and penetrative Judeo-Christian perspectives. The Supreme Court dissent applied section 162 of the Penal Code to criminalise women-women sexual activities in *Gitari I* case. In *COL* case, the High Court cynically described anal and oral sex as modern discoveries. As discussed earlier, the '*gross indecency acts*' sought to curb non-procreational and non-penetrative sex.

59 Sanders (n 9) 4.
60 R Mills 'Male-male love and sex in the middle ages' in M Cook and others (eds) *A Gay History of Britain* 2007.
61 Michael (n 8) 3.
62 n 9 above, 2.

Some approaches reinforce the state's overtures to maintain public morality and order. As discussed above, anti-sodomy laws sought to maintain the social and religious order of things. HRW also theorised how anti-sodomy laws evolved from vagrancy laws that controlled public morality and order through 'catamite' offences against male persons dressing like women in the public place or practicing sodomy. [63] Vagabonds in public spaces were associated with sexual immorality. Some Anti-begging provisions in vagrancy then evolved to criminalise 'eunuchs' and transgender identities. In 1897, the 'eunuch identity' was linked to IPC's section 377 that provides for sodomy offence through amendments. Similarities have been drawn between the vagrancy laws and sodomy offences in controlling public spaces, morality and order.[64] Like Anti-begging laws aiming to get rid of 'unwanted' and 'undesirable' people from public spaces on morality grounds, sodomy offences aimed to punish 'unwanted' sexual acts in public and private spaces on the grounds of morality. Just like anti-sodomy laws that criminalise and punish people's sexual identities, vagrancy laws criminalise people for who they are. Both laws targeted vulnerable persons and sexual minorities such as beggars and transgender women.

Finally, the basis for the High Court's interpretation in the *COL case* sanitising forced annal examination, which was overturned by the Court of Appeal, is to reinforce the state's control over human bodies through private invasions. Historically, the British used forensic examinations to monitor the anuses of 'habitual sodomites' and convicted

63 n 4 above, 28-30.
64 HRW (n 4 above) 26-28.

them for being 'funnel-shaped, trumpet-shaped or hair-shaven.'[65] Yet, it amounts to a state invasion of privacy.

2.5 Conclusion

The chapter discussed the transformative constitutionalism and queer theories first. It demonstrated how they augment some inclusive constitutional interpretative approaches such as multidisciplinary, decoloniality, constitutional morality and counter-majoritarianism. It drew illustrations from South Africa and India on how courts used the theories to decriminalise anti-sodomy laws. The chapter then historicised the journey of anti-sodomy laws from Britain through Australia, and then to India, and finally Kenya. Historicisation exposed the veneer of colonialism and coloniality in anti-sodomy laws. It also examined the constitutional-making process and postulated how Article 45(2) of the Constitution's 'not outlawing same sex unions' reflect compromise in response to contestations on the subject. It faulted judicial approaches that rely on Article 45(2) of the Constitution to affirm anti-sodomy laws without appreciating that it does not outlaw same sex unions. The chapter finally explored the basis for the current judicial approaches to Article 45(2) of the Constitution and anti-sodomy laws and made five findings. First, coloniality and colonialism influence the language and interpretation of anti-sodomy laws. Secondly, the courts seek to protect heterosexual marriages from homosexual contamination based on religious and colonial constructs that frame non-heterosexuality as social contagion, contamination and pollution. Third, the courts affirm anti-sodomy laws based on the notion of state control over public spaces, morality and order. Finally, some interpretations reinforce state's invasion of human bodies, even in relation to

65 HRW (n 4 above) 31-35.

private sexual activities. All these depict mechanical, narrow and rigid judicial interpretative approaches.

Chapter Three

Identifying Inclusive Interpretative Approaches that Decriminalise Anti-Sodomy Laws from International, Regional and National Jurisprudence

3.1 Introduction

The previous chapter unearthed the colonial and religious constructs underpinning the current interpretations affirming anti-sodomy laws in Kenya. This chapter now seeks to identify inclusive approaches from comparative jurisprudence within the transformative constitutionalism and queer theories framework. The objective is to demonstrate how the existing judicial approaches deviate from comparative inclusive interpretations that have decriminalised anti-sodomy laws across the world. To achieve this objective, the chapter is broken down into two parts. The first part examines inclusive interpretative approaches emanating from international, regional and national jurisprudence. Its scope excludes the first legislative-led wave of anti-sodomy decriminalisation that occurred between 1871 and the 1950s through the influence of France.[1] It rather focuses on jurisprudence from the second anti-sodomy decriminalisation wave from 1951-1990s inspired by the liberal constructs on individual privacy and choice.[2] It also considers decisions from the present third wave of constitutional democratisation that dawned from the 1990s across the Global South.[3] The second part discusses how the existing interpretations deviate from the inclusive interpretive approaches that have

1 JF Mignot 'Decriminalizing homosexuality: A global overview since the 18th century' (2022) 143 *Annales De Démographie Historique* 115.
2 AK Perrin 'The evolution of sodomy decriminalization jurisprudence in transnational and comparative constitutional perspective' (2023) 32 *William & Mary Bill of Rights Journal* 239.
3 DM Okubasu 'Real constitutional change in Sub-Saharan Africa after the third wave of democratisation: A comparative historical inquiry' unpublished LLD Dissertation, Universiteit Utrecht, 2022.

decriminalised non-normative sexualities. The conclusion summarises the discussion findings.

3.2 Inclusive interpretative approaches

One section of this part discusses interpretations from the charter monitoring institutions. I term them as 'charter inclusive interpretative approaches.' Another section considers those approaches from the national courts. I term them as 'constitutional inclusive interpretative approaches.'

3.2.1 The charter inclusive interpretative approaches

Anti-sodomy decriminalisation jurisprudence from the Human Rights Committee (HRC), the Committee on the Convention on the Elimination of All Forms of Discrimination against Women (Committee on CEDAW), the European Court of Human Rights (ECtHR), the European Court of Human Rights (ECHR), the African Commission for Human and Peoples' Rights (ACHPR) and the Inter-American Commission on Human Rights (IACHR) espouses a five-prong approach within the transformative and queer ideals of pluralism, broadmindedness, tolerance and diversity.

3.2.1.1 Historicisation approach

All decisions from the ECtHR that decriminalised anti-sodomy laws appreciated their origins, contexts and developments through a historicisation approach. As chapter two finds, Britain codified sodomy offences based on socio-religious antecedents and exported them to its colonies. Upon embracing the liberal ideology, Britain started reforming its laws to decriminalise sodomy.[4] The ECtHR picked up the decriminalisation

4 Wolfenden Committee *The Report on homosexual offences and prostitution* (1957).

discourse using historicisation as an inclusive interpretative tool. In the *Dudgeon v the UK* (Dudgeon) case, it historicised Scotland's sodomy statutes from the criminal law perspective.[5] It found them ultra vires on protecting the general public from harm and the vulnerable against corruption and exploitation. In the *Norris v Ireland* (Norris) case, the ECtHR historicised Ireland's homosexual laws from human rights perspectives.[6] It found them posing violative rights threat through enforcement. Through historicisation, the ECtHR exposed how courts in Cyprus enforced anti-sodomy to prevent the spread of homosexuality.[7] As an inclusive interpretative tool, historicisation unearths how anti-sodomy laws are founded on flawed legal foundations, and enforced based on homophobic socio-religious constructs like social contagion.

3.2.1.2 Human rights morality approach

Anti-sodomy laws were conceived on socio-religious constructs of maintaining social purity, socio-religious order and discouraging non-procreational sex.[8] These socio-religious constructs still underpin public morality claims against anti-sodomy decriminalisation. An interpretative approach countering claims can be described as 'the human rights morality' based on democratic and human rights parameters, values and principles. In a constitutional context, it would be constitutional morality. The ECtHR, ECHR and HRC have decriminalised anti-sodomy laws using the 'human rights morality approach.'

5 *Dudgeon v the UK*, Application no. 7525/76 *(1981)* paras 14-28.
6 n 5 above, pars 11-33.
7 *Alecos Modinos v Cyprus* Application No. 15070/89 (1991) paras 18-26
8 DK Michael 'The offence of sodomy: England's least lovely criminal law export?' (2011) *The Journal of Commonwealth Criminal Law* 1.

In the context of private same-sex between consenting adults, the ECtHR framed the approach as 'private morality' and used it as follows.[9] First, it held that limiting private rights based on the morals and rights of others must be within democratic ideals. Secondly, public views cannot justify interference with privacy rights. Finally, it restricted the state's 'margin of appreciation' to legislate on moral issues to only address pressing social needs while reflecting tolerance and broadmindedness. In another case, the ECtHR framed the 'human rights morality' approach as 'non-interference to private boundaries.'[10] It not only reasoned that 'private adult consensual homosexual activities cannot be interfered with because the public deems them immoral and is shocked, disturbed and offended' but also further restricted the margin of appreciation principle.[11] In the *Bayev & others v Russia* (Bayev) case that challenged Russia's homosexuality bans, it framed the approach from 'the underlying Convention values.'[12] It held that predicating minority rights upon majoritarian acceptance is incompatible with the underlying values of the European Convention on Human Rights. In any case, it reasoned that Europe is increasingly accommodating non-heterosexuals, and disregarded the margin of appreciation principle. The ECHR took a similar approach in the *Modinos v Cyprus* (Modinos) case.[13]

As an inclusive interpretative approach, the 'human rights morality approach' seems to have diminished the margin of appreciation principle that underpins the state's justification to legislate moral issues and protect public mores. Finally, the HRC discarded the principle in the *Toonen v Australia* (Toonen) case, using a three-pronged

9 *Dudgeon* (n 5) paras 52-62.
10 *Norris v Ireland* Application no. 10581/83 (1989).
11 Norris (n 10) paras 41-44.
12 *Bayev & others v Russia applications nos. 67667/09, 44092/12 and 56717/12* (2017).
13 Modino (n 7) para 45.

approach.[14] It prevents state justification of intrusions into privacy on moral grounds. Moreover, the non-enforcement of anti-sodomy laws suggests they require no moral protections. Lastly, it is unreasonable to impose morals from a single tradition in a society with diverse social, religious and philosophical orientations.

3.2.1.3 Human rights-based approaches (HRBA)

The HRBA are premised on human rights and democratic ideals of public participation, equality and non-discrimination, accountability and transparency.[15] I find that the approach complements the transformative constitutionalism and queer vision of an egalitarian society based on inclusivity, transparency and accountability. Significantly, it appreciates that human rights are interrelated.[16] It also requires courts to prioritise the needs of vulnerable groups and promote dignity, equality, agency and self-determination rights.[17] Treaty-monitoring institutions have interpreted charters to decriminalise anti-sodomy laws within the HRBA.

Within the HRBA, the *Dudgeon,*[18] *Norris*[19] *and Tonen*[20] decisions have annulled anti-sodomy laws for posing a violative threat to non-heterosexuals through enforcement based on their mere existence. The IACHR adopted similar reasoning to decriminalise Jamaica's beggary laws.[21]

14 *Toonen v. Australia* (31 Mar 1994) CCPR/C/50/D/488/1992 (1994).
15 The Swedish International Cooperation Agency *Human Rights Based Approach at SIDA: Compilation of Briefs on Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons* (2015).
16 United Nations *Reproductive Rights are Human Rights: A Handbook for National Human Rights Institutions* (2014).
17 UN (n 213 above) 34.
18 n 5 above, paras 33,41.
19 n 10 above, paras 11-19, 22, 29,31,33.
20 n 14 above, para 5.1.
21 *IACHR Report No. 400/2, Caso 13.637.*

I present the HRBA as maximalist to rights and minimalist to rights limitations. In this context, the privacy rights have been expanded to include adults' autonomy to engage in consensual same sex activities while restricting the harm principle limitation to 'protecting people from injury and vulnerable against corruption and exploitation.'[22] A minimalist approach to the interference of homosexual expressions has been proffered through delinking homosexuality from pedophilia and challenging the evidence on how homosexual expressions devalue traditional family systems and compromise their future.[23]

Finally, the HRBA interrelates a number of rights on the liberty to engage in homosexual activities. The ECtHR interlinked the dissemination of sexuality knowledge to promotion of healthcare and population growth.[24] The HRC interlinked anti-sodomy decriminalisation to the promotion of public health and strengthening the HIV/AIDS control measures.[25] Similarly, the IACHR found Jamaica's beggary laws violating interrelated rights on privacy, non-discrimination, inhumane treatment, movement and residence under the American Convention on Human Rights.[26] Finally, the Committee on CEDAW interlinked discriminative effects from Sri Lanka's anti-sodomy laws to the exacerbated gender-based violence, harmful gender stereotypes and breaches the women's autonomy and choice rights.[27]

22 *Dudgeon* (n 5), paras 52-62.
23 n 12 above.
24 n 12 above.
25 Toonen (n 14) para 8.5.
26 n 21 above.
27 *CEDAW Committee on Article 7 (3) of the Optional Protocol Comm No. 134/2018* paras 9.3-9.7

3.2.1.4 Multidisciplinary approaches

Within the judicial context, a multidisciplinary approach involves courts consulting diverse and competing overviews of potentially relevant interests and variables on legal issues.[28] It includes courts considering non-legal phenomena during interpretations.[29] I also conceptualise multidisciplinary interpretative approaches as the consideration of non-legal factors such as the historical, socio-economic and political contexts in legal interpretations. An example is when the ECtHR considered non-legal factors to gauge the increasing accommodation of non-heterosexuals in Europe[30] as well as tolerance towards homosexual acts in Cyprus.[31]

3.2.1.5 Hierarchy of human rights norms approach

The criterion for hierarchising human rights norms attracts fierce contestation. One criterion proffered is the derogability versus non-derogability of some rights.[32] Klein disputes this criterion alongside others like treaty-based norms versus customary law norms and the acceptability versus inadmissibility on rights reservations.[33] He proposes *jus cogens* concept. However, Shelton comes up with a simpler criterion.[34] She proposes a practical approach that asks which rights are the most endangered and need the greatest defence in a particular context.[35] But for Mutua, it is 'formal equality' and 'abstract

28 K Henrard 'Exploring the potential (contribution) of multi-disciplinary legal research for the analysis of minorities' rights' (2015) 3 Erasmus Law Review 1.
29 W Mutunga 'Fighting corruption in judiciaries under transformative constitutions: reflections from Kenya' in Kang'ara & others (eds) *The Beacons of Judiciary Transformation: Selected Speeches, Writings and Judicial Opinions by Chief Justice Willy Mutunga* (2022) 236.
30 Bayev (n 12) paras 63-84.
31 Modino (n 7) paras 45.
32 T Koji 'Emerging hierarchy in International Human Rights and beyond: from the perspective of non-derogable rights' (2001) 12 *European Journal of International Law* 917.
33 E Klein 'Establishing a hierarchy of human rights: ideal solution or fallacy?' (2008) 41 *Israel Law Review* 477.
34 D Shelton 'Hierarchy of norms and human rights: of trumps and winners' (2002) 65 *Saskatchewan Law Review* 301.
35 As above.

autonomy' norms that take precedence in the human rights corpus.[36] He defines these norms as the intrinsic human worth in an equal sense and autonomy to make decisions respectively. I strike the balance to these competing arguments as follows. First, human rights hierarchisation criterions should be contextual. Secondly, value-based hierarchisation appears more appealing to me because it introduces the human face in rights enforcement. Finally, hierarchisation of human rights norms should limited to contexts with competing interests. The Committee on CEDAW employed this approach by holding that anti-sodomy laws violate equality and non-discrimination rights which have achieved *jus cogens* status, thus, permeating and overriding every legal structure.[37]

3.2.2 Constitutional inclusive interpretive approaches

Having discussed jurisprudence from Europe above, this section samples jurisprudence from America, Asia, African and Caribbean continents that have decriminalised anti-sodomy laws. The twelve decisions sampled represent the Global South apart from the *Lawrence v Texas* (Lawrence) case from the United States of America (USA).[38] Using the sample, I identify nine interpretive approaches that decriminalise anti-sodomy laws. The approaches fall within the transformative constitutionalism and queer framework whose tenets include appreciating diversity, pluralism, historical consciousness, amelioration of marginalised groups and counter-heteronormativity.

36 As above.
37 n 27 above, paras 78-80.
38 *Lawrence v Texas* 539 US (2003).

3.2.2.1 HRBA

The HRBA parameters were discussed in section 3.2.1.3 above. In decriminalising anti-sodomy laws, all the twelve decisions applied HRBA. I sample some below.

In the *Lawrence case*, the USA Supreme Court used a maximalist interpretation to liberty rights and interrelated it with privacy and dignity rights to protect private homosexual relationships and activities.[39]

In the *NCGLE and Others v Minister of Justice and Others* (NCGLE) case, the South African Constitutional Court adopted HRBA in four ways.[40] First, it interpreted equal rights broadly to show how the unfair differentiation by anti-sodomy laws between heterosexuals and homosexuals reinforce social prejudices against homosexuals that cause them stigma, depression, police abuse and violence.[41] Secondly, it interlinked equality, dignity and privacy rights to demonstrate their embarrassment when arrested from their private precincts, unlike heterosexuals.[42] Third, using the transformative constitutionalism concept, the court framed homosexuals as political minorities that cannot secure legislation to protect them, thus, deserving protection from harm.[43] Finally, it used intersectionality to show how multiple grounds of unfair discrimination can occur within the equality clause.[44]

In the *Caleb Orozco v Attorney General & others* (Caleb) case, the Belize Supreme Court used maximalist interpretation to decriminalise anti-sodomy laws.[45] For instance, it found anti-

39 n 38 above, paras 564–579.
40 *NCGLE and Others v Minister of Justice and Others* (1999).
41 n 40 above, 11-26.
42 n 40 above, 27-32.
43 n 40 above, 60.
44 n 40 above, 110-114.
45 *Caleb Orozco v Attorney General & others, BZCA 32 of 2016* (2019).

sodomy laws undermining dignity by stigmatising homosexuals as criminals and conflating their consensual sexual conducts with pedophilia and bestiality.[46]

In the *Jason Jones v Attorney General* (Jason) case, the High Court of the Republic of Trinidad and Tobago (RTT) used minimalist interpretation of the limitations of privacy rights in the context of family values.[47] It stated:

> "What is a traditional family? If it is limited to a mother, father and children, then, once again, the rationale for keeping that template is no longer sufficiently important as the rationale for denying the claimant's fundamental rights. For example, single-parent families are becoming a norm which is unsettling to many traditionalists despite its reality. As has been shown, the values that represent society have dramatically changed as democratic societies have now moved to accept that laws such as these under scrutiny are no longer necessary.[48]

3.2.2.2 Decoloniality notion

Decoloniality is a political and epistemological drive to liberate ex-colonised peoples from global coloniality.[49] As an inclusive interpretative approach, decoloniality can dismantle modern society's power patterns that reflect 'Euro-America-centric, Christian-centric, patriarchal, capitalist, hetero-normative, racially hierarchised' traits originating from coloniality.[50] I thus postulate decoloniality as an inclusive interpretative approach that historicises anti-sodomy laws to deconstruct their underlying colonial constructs that influence how they are thought, known and applied. It also provides the framework to amplify the knowledge, voices and experiences of those marginalised through

46 n 45 above, par 57.
47 *Jason Jones v Attorney General of Trinidad and Tobago* (2018).
48 n 47 above, para 170.
49 SJ Ndlovu 'Decoloniality as the Future of Africa' (2015) 13 *History Compass* 485.
50 As above.

colonialism and coloniality.[51]Almost all the decisions sampled used decoloniality to decriminalise anti-sodomy laws. A sample is highlighted below.

From Asia, the Supreme Court of India in the *Navtej Singh Johar v Union of India* (Johar) case used the decoloniality notion to decriminalise consensual same sexual activities between adults in private.[52] It historicised section 377 of the IPC and faulted India for clinging to the oppressive colonial legislative bequest yet it is now a constitutional democracy.[53] From Africa, the High Court of Botswana in the *Letsweletse Motshidiemang and LEGABIBO v the Attorney General* (Letsweletse) case historicised sections 162 and 164 of Botswana's Penal Code and exposed their Judeo-Christian and Anglo-Roman constructs.[54] However, it erred that the sections were grafted from section 377 of India's Penal Code instead of the Penal Laws of Queensland. From the Caribbean, the High Court of Antigua and Barbuda Republic (ABR) in the *Orden David & Another v Attorney General* (Orden) case historicised the buggery and gross indecency offences as colonial relics and annulled them.[55] Finally, the American Supreme Court in the *Lawrence case* historicised and overturned the reasoning that 'proscriptions against homosexuality have ancient roots' in the *Bowers decision* which dismissed as selective history.[56]

3.2.2.3 Constitutional morality approach

Constitutional morality denotes a value-based interpretation of the constitution in a democracy.[57] Grote first defined it as 'paramount reverence for the forms of the

51 Oxfam International *Decolonize! What Does It Mean?* (2022).
52 *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
53 n 52 above, 276-282.
54 *Letsweletse Motshidiemang and LEGABIBO (as amicus) v The Attorney General* (2019).
55 *Orden David & Women Against Rape Inc v Attorney General of Antigua and Barbuda* (2022).
56 *Bowers* v *Hardwick* 478 US (1986).
57 A Chakravarti 'Constitutional morality in the context of Indian legal system' (2020) 3 *International Journal of Law Management & Humanities* 64.

constitution, enforcing (…) and acting under and within these forms.'[58] Ambedkar amplified it during India's constitutional-making process.[59] In the *Johar case*, the Supreme Court of India held that constitutional morality overrides public morality and decriminalised adult same sex conducts in private despite the public viewing these acts as immoral.[60] Whilst the constitutional morality approach was seemingly conceived and bred in India over centuries, other jurisdictions have embraced it as an inclusive approach to decriminalise anti-sodomy laws.

The South African Constitutional Court framed it as 'constitutional pluralism and morality' that requires accommodation of differences and constatations over sexual orientation, without marginalising any group.[61] In the *Ah Seek v the State of Mauritius* (Seek) case, the Mauritius High Court while annulling anti-sodomy laws, countered the claims that 'same-sex is highly sensitive in the socio-cultural and religious fabric of the Mauritian society' that Mauritius is the secular state.[62] The RTT High Court also framed it from the secular State prism where religious beliefs cannot determine constitutional rights.[63] The High Court of Botswana approached it from the perspective of 'constitutional pluralism' that sanctions diversity and pluralism within shared values as well as tolerance towards minority views, respecting autonomy on sexual preferences and choices, and restraining from being over-prescriptive, therefore 'forcing people to be who we are.'[64] While insisting that human rights are not moral issues, the High Court of

58 G Grote *A History of Greece* (2000) 93.
59 BR Ambedkar '*If hereafter things go wrong, we will have nobody to blame*' A final Speech in Constituency Assembly (1949).
60 n 52 above.
61 NCGLE (n 40) 131-132.
62 *Ah Seek v The State of Mauritius* (2023).
63 *Jason* (n 47) paras 13-14.
64 *LM* (n 54) paras 141,198,210.

Belize held that reference to God and the Creator in the Constitution does not import religious principles into its interpretation.[65] Finally, in the Dominican Republic, the High Court held that the private family life and personal spaces relating to sexual identity and orientation cannot be intruded on based on public morality.[66]

3.2.2.4 Counter-majoritarian approach

Counter-majoritarianism involves court decisions that emancipate minorities by striking down the majoritarian and popular legislative and executive policies.[67] It appreciates that the Constitution must protect those who are unpopular, or those the majority may find morally objectionable.[68] Dorf underscores the three-pronged significance of the counter-majoritarianism approach.[69] It protects the rights of those marginalised by the majoritarian-led political processes. It also makes the Constitution conform with present opinions to move away from originalist interpretations. It finally helps to filter raw opinions from informed opinions. This research argues that colonial constructs informing homophobia represent raw opinions that have neither been critically interrogated but also are insensitive. Counter-majoritarianism enables the courts to counter-check the democratic excesses that make groups vulnerable and powerless.[70]

In the *Lawrance case*, the USA Supreme Court of America protected sexual minorities using a counter-majoritarian approach and held that the majority perception against

65 *Caleb* (n 45) para 57.
66 *BG v Attorney General & Others* (2024) pars 35-38.
67 DN Reynaud & J Brickhill 'The counter-majoritarian difficulty and the South African Constitutional Court' (2006) 25 *The Penn State International Law Review* 371.
68 M Mutua 'Rights body has finally stood up for gays and lesbians' *The Sunday Nation* 12 May 2012.
69 MC Dorf 'The majoritarian difficulty and theories of constitutional decision making' (2010) 13 *University of Pennsylvania Journal of Constitutional Law* 283.
70 DL Hutchinson 'The majoritarian difficulty: Affirmative action, sodomy, and Supreme Court politics' (2005) 23 *Minnesota Journal of Law & Inequality* 1.

particular practice as immoral does not justify its criminalisation.[71] In the *Caleb case*, the Supreme Court of Belize employed the counter-majoritarianism to affirm that harmless private activities cannot be interfered with based on majority views and public morals.[72] In the *Letsweletse case*, Botswana High Court held that public opinion cannot substitute the court's duty to interpret the Constitution.[73] On appeal, the Botswana's Court of Appeal concurred that sexual minorities need protection from the popular majority because they cannot legislate to protect themselves.[74]

3.2.2.5 The Law Speaks Approach

This doctrine imputes that some terms in the statutes should be given contemporary meanings.[75] It thus opens the possibilities of a statute to accommodate present circumstances that were unforeseeable during drafting.[76] The doctrine was conceived in the common law chambers but has now evolved into other legal contexts. In the international law context, the ECtHR has expanded the rights under the European Convention of Human Rights by framing it as a 'living instrument.'[77] Similarly, there is ample jurisprudence and constitutional texts which I find presenting constitutions as 'living instruments' that require purposive interpretation.

Some courts have applied the doctrine as an inclusive interpretative approach to decriminalise anti-sodomy laws. To prohibit discrimination against non-heterosexuals

71 *Lawrence* (n 38) 560,571
72 *Caleb* (n 45) para 89.
73 *LM* (n 54) paras 185-186.
74 *The Attorney General v Letsweletse Motshidiemang and LEGABIBO (as amicus) (2021)* paras 88-90.
75 D Meagher 'The 'always speaking' approach to statutes and the significance of its misapplication in *Aubrey v the Queen)*' (2020) 43 *University of New South Wales Law Journal* 191.
76 A Burrows 'Statutory interpretation in the courts today' *University of Hertfordshire, Sir Christopher Staughton Memorial Lecture* (2022).
77 MF MacRoberts 'Statutory interpretation and the "always speaking" principle' (2023).

based on sexual orientation, the Mauritius High Court in the *Seek case* reasoned that the 'Constitution is not hermetically sealed, nor cast on stone and other groups or classes needing protection may arise.'[78] As a living and organic document, the *Johar case* held that the transformative Constitution must be dynamic, adaptive and transformative with the changing needs of time.[79] In annulling beggary and gross indecency offences, the High Court of St. Christopher and Nevis (CN) interpreted the 'constitution as a living document whose interpretation must be re-examined according to evolving circumstances.'[80] Finally, the High Court in the *Orden case* of ABR interpreted the constitution as living documents that must be re-examined of its application in contemporary developments.'[81]

3.2.2.6 Hierarchy of constitutional norms

It is difficult to hierarchise the constitutional norms. Richard and others have made some findings on this issue.[82] First, some constitutional provisions are consequential while others are symbolic. Secondly, some constitutional provisions are more important while others are less important. The authors argue that the constitutional-making exercise is often a socio-political process calling sometimes for compromises and prioritising some provisions, thus, introducing hierarchy. I postulate that the final constitution documents require 'as whole' interpretations without hierarchising its norms but exceptional circumstances involving competing norms could invite hierarchisation that enhances transformative constitutionalism. This interpretative approach does not manifest

78 Seek (n 62) 17-18.
79 n 52 above, para 96.
80 *Jamal Jeffers & St. Kitts & Nevis Alliance for Equality Inc v The Attorney General of St. Christopher and Nevis (2022)* para 22.
81 n 55 above, para 50.
82 A Richard and others 'Which constitutional provisions are most important?' (2024).

explicitly from the jurisprudential sampled. However, the *Orden case* alludes to it by invoking the universality of international human rights in constitutional interpretation.[83] The Mauritius High Court even interpreted the Constitution's Bill of Rights in conformity with international norms and standards.[84] I think universalising some constitutional norms, like in the Bill of Rights, sort of hierarchises them.

3.2.2.7 Constitutional conformity approach

This approach calls for courts to align statutory provisions to constitutional values and norms, especially where they are ambiguous.[85] In the *Johar case*, the Supreme Court of India uses a constitutional conformity approach as an inclusive interpretative to annul section 377 of the Indian Penal Code only to the extent that it criminalises adult consensual sexual activities in private. Otherwise, the section was left intact to charge those committing defilement and rape.[86] Although the sampled decisions did not take the *Johar case* approach, their starting points were whether anti-sodomy laws conformed to the constitution.

3.2.2.8 Comparative jurisprudence

The final inclusive interpretative strand that runs across the sampled research decisions is comparative jurisprudence. An example is the Mauritius High Court which heavily relied on comparative jurisprudence to hold that 'sex' includes 'sexual orientation' which is innate and entails the sexual and gender identity of the person.[87]

83 n 55 above, paras 52-64
84 Seek (n 62) 17.
85 P Daly 'Constitutionally conforming interpretation in Canada' (2022).
86 n 52 above.
87 n 62 above.

3.3 Exploring Kenya's Judicial Interpretive Deviations

This section revisits the basis for existing interpretations in Kenya that affirm anti-sodomy laws to demonstrate how it deviates from the inclusive interpretative approaches within the transformative constitutionalism and queer theoretical framework discussed above.

In the *Gitari II case*, the High Court's narrow interpretations that affirmed anti-sodomy laws negate numerous inclusive interpretive approaches.[88] An example is its interpretative deviation from the HRBA inclusive approach. First, the inclusive approaches from the comparative jurisprudence sampled show how anti-sodomy laws were annulled for posing 'violative threats' on the non-heterosexuals rights through enforcement. Others insisted that the mere existence of anti-sodomy laws is discriminative and not dignifying to non-heterosexuals. Yet, the High Court of Kenya insisted on cogent evidence of rights violations through anti-sodomy laws.[89] Secondly, the High Court of Kenya's decision fails to consider the discriminative effect of anti-sodomy penal provisions. In the *NCGLE case*, South African Constitutional Court considered intersectional discrimination that non-heterosexuals face such as stigma, depression and violence resulting from criminalisation of sodomy.[90] Finally, Kenya's High Court failed to appreciate the interrelatedness of rights. Using HRBA-led inclusive interpretations, courts have weaved expression, privacy, dignity, equality and health rights to decriminalise anti-sodomy laws. In fact, Kenya's High Court failed to appreciate

88 *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*
89 n 88 above, paras 307-322
90 n 40 above

medical expert reports on the health rights implications of criminalising homosexuality[91] when its counterpart in Botswana relied on them to decriminalise anti-sodomy laws.[92]

Another interpretative deviation from the High Court of Kenya is its failure to delink adult consensual private same sex conduct with defilement, rape and bestiality using a constitutional-conformity inclusive approach. In the *Johar case*, India's Supreme Court developed section 377 of the IPC to conform with its constitution through decriminalising its aspects that criminalise consensual and private same sex between adults.

The High Court of Kenya also deviated from constitutional morality and counter-majoritarian approaches in reading majoritarian social-religious morals into Article 45(2) of the Constitution to affirm anti-sodomy laws. The Court of Appeal and the Supreme Court dissenters in *Gitari II decisions* took a similar approach. Yet, as seen in the *Johar case*, constitutional morality supersedes socio-public morality, and also the *LM case* desisted from being influenced by the public majoritarian opinions.

Finally, the High Court of Kenya's decision failed to use the decoloniality notion to decriminalise anti-sodomy laws. While the examples of the decisions sampled decriminalised sodomy after historicising them, Kenya's High Court did not. Had it historicised them, perhaps, it would find that the age-old anti-sodomy laws have only convicted one person as chapter two of this research depicts. Like in the *Toonen case*, the High Court would have appreciated that anti-sodomy laws no longer serve their objectives to protect morals because people still engage in same sex conducts. Sodomy offences in the Penal Code are thus moribund and redundant. Similarly, the Supreme

91 n 88 above, paras 307-322
92 n 54 above

Court's dissenting opinions failed to historicise anti-sodomy laws convincingly. They traced Kenya's anti-sodomy penal provisions to section 377 of the IPC, instead of the PQL. They also failed to apply decoloniality to unearth the colonial and religious constructs underpinning them. Finally, the judges applied selective historicisation of Article 45(2) of the Constitution to overlook its negotiation process and compromise as well as the minority views.

3.4 Conclusion

The chapter sought to excavate comparative lessons on inclusive interpretative approaches that decriminalised anti-sodomy laws from different jurisdictions to contrast them with existing judicial interpretations from Kenya. It has established the comparative inclusive approaches anchored on queer and transformative constitutionalism framework such as HRBA, counter-majoritarianism, constitutional and human rights morality, historicisation and decoloniality notion, hierarchy of human rights and constitutional norms, comparative jurisprudence, the constitution is speaking doctrine and constitutional-conformity approaches. Upon contrasting these inclusive approaches against the narrow interpretations from Kenya, the findings can be summarised in three-fold. First, the existing interpretations in Kenya fail to decolonise anti-sodomy laws and develop them in conformity with the constitutional norms and values. Secondly, they seem to have been influenced by majoritarian public views and socio-religious morality to affirm anti-sodomy laws in the context of Article 45(2) of the Constitution which deviates from constitutional morality and counter-majoritarian approaches. Finally, the existing High Court interpretations construe rights narrowly without appreciating anti-sodomy laws' violative threats and discrimination effects on privacy, equality and dignity rights. This is a deviation from HRBA. In conclusion, these findings call for the

need to test these inclusive interpretative approaches on Article 45(2) of the Constitution in the next chapter in exploring how they can augment decriminalisation of anti-sodomy laws.

Chapter 4

Decriminalising Anti-Sodomy Laws through Inclusive Interpretative Approaches to Article 45(2) of the Constitution

4.1 Introduction

Chapter three identified nine inclusive interpretive approaches based on the sampled comparative jurisprudence. This chapter now seeks to test these approaches on Article 45(2) of the Constitution of Kenya. Its objective is to augment the decriminalisation of anti-sodomy laws based on inclusive interpretative approaches developed within the transformative constitutionalism and queer framework. Achieving this objective would resolve the research problem of Article 45(2) of the Constitution being the stumbling block in the judicial review of anti-sodomy laws in Kenya. The chapter is broken into two parts. Part one situates Article 45(2) of the Constitution in its textual context. Part two applies inclusive interpretative approaches to Article 45(2) of the Constitution. The conclusion summarises the chapter's findings.

4.2 Textual context of Article 45(2) of the Constitution

The problematised Article 45(2) of the Constitution lies amid four 'family' rights:

> *"45. (1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.*
>
> ***(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.***
>
> *(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage*
>
> *(4) Parliament shall enact legislation that recognizes—*

> *(a) marriages concluded under any tradition, or system of religious, personal or family law; and*
>
> *(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.*

Apart from the marginal title, the term 'family' appears only in Article 45(1) and 45(4). Others use the term 'marriage.' The terms have not been conflated. As discussed in Chapter One, the terms have different meanings in linguistic and social contexts. As postulated in chapters one and two of this research, 'family' connotes flexible and all-inclusive unions which could include non-normative unions while 'marriage' is specific and non-inclusive imputing well-defined marital relationships. Although it does not recognise them explicitly, Article 45(2) evidently does not outlaw or prohibit same sex unions. Chapter Two traced this 'constitutional silence' to constitutional-making negotiations and compromise. Finally, Article 45(3) focuses on spousal rights in marriage contexts.

4.3 Inclusive interpretative approaches to Article 45(2) of the Constitution

This part now narrows the inclusive interpretative approaches into the context of Article 45(2) of the Constitution.

4.3.1 Human rights-based approaches (HRBA)

From chapter three, the HRBA manifests two strands of interpretations. One uses a maximalist human rights interpretation within liberal, broad and purposive while adopting a minimalist approach to limit rights to the greatest extent. Another strand use the interrelatedness doctrine to approach a single right within the gamut of the human rights corpus.

Using HRBA's interpretative strands above, it is imperative that Article 45(2) of the Constitution be approached in the context of other interrelated rights and be interpreted to maximalise the enjoyment of these rights while constricting their limitations to the greatest extent possible. In *Gitari II case,* Article 45(2) of the Constitution was cited to affirm anti-sodomy laws.[1] However, it was considered in isolation of other sexual minorities' interrelated rights such as expression, privacy, non-discrimination, dignity and healthcare. Freedom of expression entails sexual choices of consenting adults,[2] which includes having sexual intercourse,[3] whether heterosexual or homosexual. Criminalising the only mode of sexual expression through anti-sodomy laws deprives non-heterosexual persons of their self-worth, thus, infringing their right to dignity.[4] Additionally, it discriminates against them based on sexual orientation.[5] Kenya's Supreme Court's majority decision also expanded the non-discrimination grounds to include sexual orientation.[6] The *Toonen case* interpreted the privacy right to include consensual and private same sex between adults.[7] The *Orden case* expanded the right to privacy further to encompass gender identification and sexual orientation.[8] Finally, anti-sodomy laws drive homosexuals underground which prevents them from seeking healthcare services, thus exposing them to sexually transmitted diseases and other healthcare problems such as stigma, abuse and violence.[9]

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[1] *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*
[2] *Orden David & Women Against Rape Inc v Attorney General of Antigua and Barbuda (2022)* par 80.
[3] *Jamal Jeffers & St. Kitts & Nevis Alliance for Equality Inc v The Attorney General of St. Christopher and Nevis* (2022) par 76.
[4] *LM and LEGABIBO (as amicus) v the Attorney General (2019)* pars 129-165.
[5] *Toonen v Australia* (1994) pars 8.2-8.7.
[6] *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae)* [2023].
[7] n 5 above.
[8] n 2 above, par 70.
[9] *NCGLE and Others v Minister of Justice and Others* (1998) pars 11-26.

Abortion, sexual orientation and gender expressions seem to have been the most contentious issues during Kenya's constitution-making process. Article 26(4) of the Constitution on access to abortion mirrors the Constitution's Article 45(2) in terms of silences and ambiguities resulting from constitutional negotiations and compromises. In an unprecedented but inclusive approach, the High Court of Kenya faulted the phrasing of Article 26(4) of the Constitution that seems to equate a foetus life to that of mother's life.[10] It then adopted through the interrelated rights of privacy and autonomy to promote women's rights to access abortion, and decriminalised abortion.[11] A parity of reasoning would hold that HRBA on Article 45(2) of the Constitution also decriminalises anti-sodomy laws.

A maximalist interpretation promotes sexual minorities' interrelated rights by appreciating that Article 45(2) of the Constitution neither prohibits nor outlaws same sex unions. It also appreciates that not all consensual same sex activities between adults are engaged in the familial or marital contexts contemplated under Article 45 of the Constitution. Sometimes heterosexual and non-heterosexual persons engage in casual or transactional sexual activities outside the family or marriage set-ups.

Article 45(2) of the Constitution could be a limitation to sexual minorities' rights to expression, privacy, dignity, non-discrimination and to form a marriage. The High Court's *Gitari II decision* took this approach too.[12] However, the HRBA interpretation counters this approach. It postulates that limitation to rights must be interpreted narrowly and constrictively. In that sense, Article 45(2) of the Constitution must be

[10] *SOS v CWRL & 4 others [2021] eKLR.*
[11] n 10 above, 21- 29.
[12] n 1 above, pars 397-398, 405.

balanced against sexual minority rights, and not inimical to their maximum enjoyment. An inclusive interpretative approach would frame it in a manner that prioritises expression, liberty, privacy, dignity and non-discrimination rights of the sexual minorities as well as consider their specific needs as a vulnerable group and ameliorate them from the enduring chains of discrimination, harassment, abuse and violence they face.

4.3.2 Constitutional morality

Chapter three presented constitutional morality as the constitutional values and norms override the public morality that is mostly premised on socio-religious majoritarianism and political correctness. The Constitution of Kenya establishes a value-based system, expressing the aspirations, dreams and fears of the nation.[13] A liberal Constitution champions pluralism, inclusivity and equality as well as appreciate that contemporary polities are multi-national, multi-ethnic, multi-religious and multi-cultural.[14] It is expected to champion individual choices and autonomy within a community as well as contain constitutional norms and values, in whatever form, that do not trample over the minorities.[15] The Court of Appeal clarified that 'what forms morality is spelt particularly in Article 10 of the Constitution.'[16] As an inclusive interpretative tool, the constitutional morality interpretation to Article 45(2) of the Constitution would augment the review of anti-sodomy in a two-pronged approach.

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[13] *The Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion No. 2 of 2012.
[14] M Rosenfeld 'Illiberal constitutionalism: Viable alternative or nemesis of the Modern constitutional ideal?' in G Jacobsohn & M Schor (eds) *Comparative Constitutional Theory* (2024) 1.
[15] As above.
[16] *Non-Governmental Organizations Co-Ordination Board v EG & 5 others* (2019) par 32.

It approaches the constitutional silence on Article 45(2) of the Constitution on whether or not it prohibits non-heteronormative sexual activities and unions through the prism of constitutional norms and values. The Constitution of Kenya is liberal and progressive. It envisages value-based governance based on 'human rights, equality, freedom, democracy, social justice and the rule of law.'[17] It establishes a secular state.[18] It also entrenches principles and values such as 'human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised.'[19] Article 45(2) of the Constitution ought to be construed within these constitutional values and norms. In contrast, the *Gitari II decision* construed Article 45(2) of the Constitution to protect majoritarian morals. [20] As discussed in chapters one and two, anti-sodomy laws are driven by the majoritarian socio-historical and religious constructs as well as politics. Affirming anti-sodomy laws based on Article 45(2) of the Constitution to reflect majoritarian views and morals departs from constitutional morality. It dehumanises sexual minorities and casts them off against the constitutional values of inclusivity, non-discrimination, dignity and de-marginalisation.

The constitutional morality approach limits sexual minority rights within the constitutional normative standard of reasonableness and justification based on 'an open and democratic society based on human dignity, equality and freedom.'[21] Applying constitutional morality, the Court of Appeal's concurring opinion in *Gitari II case* held that rights cannot be limited based on religious beliefs and popular opinions.[22] This

[17] The Constitution of Kenya, preamble.
[18] Constitution (n 17) Art 8.
[19] Constitution (n 17) Art 10(2)(b).
[20] n 1 above, par 402-405.
[21] Constitution (n 17) Art 24(1).
[22] n 16 above.

research argues that limiting non-normative sexual activities and unions to create a homogeneous heterosexual social configuration undermines pluralism, erodes dignity and takes away individual autonomy. Furthermore, the use of criminal laws to regulate human conduct in 'an open and democratic society' should be limited to protect members from 'harm' and the vulnerable from corruption. Unless it is rape and defilement, it remains unconvincing how same sex conducts in private harm consenting adults.

4.3.3 Hierarchisation of the constitutional and human rights norms

Drawing from the discussion in chapter three on this approach, this research frames the interpretation of Article 45(2) of the Constitution as a situation that involves competing interests and norms. Non-heterosexual rights to non-discrimination, dignity and autonomy compete with the right to marry a person of the opposite sex. Mutua's elevation of equality and autonomy norms in the human rights corpus becomes significant in this scenario.[23] Using the hierarchisation of constitutional and human rights norms in the Bill of Rights, the research proposes twofold inclusive approaches on Article 45(2) to decriminalise anti-sodomy laws.

It elevates equality, non-discrimination, dignity and autonomy norms over the right to marry a person of the opposite sex. In that context, it construes the silence on Article 45(2) of the Constitution liberally and broadly as non-prohibitive to non- normative sexual conduct and unions. A narrow construing of Article 45(2) of the Constitution as if outlawing non-normative sexual activities and unions undermines the sexual minorities'

[23] M Mutua 'Sexual orientation and human eights: Putting homophobia on trial' in S Tamale *African Sexualities* (2012).

entitlements to equality, non-discrimination, dignity and autonomy, which occupy a higher hierarchy within the democratic and human rights corpus.

Elevating the norm of equality and non-discrimination in the context of Article 45(2) of the Constitution calls for an intersectionality frame to assess direct and indirect discrimination effects emanating from a narrow interpretation of the provision. The concept of intersectionality holds that an act or omission can represent overlapping and multiple grounds of discrimination.[24] When construed restrictively, Article 45(2) has the following negative implications. First, it could prohibit a lesbian transsexual woman who has undergone an anatomical, hormonal and identification transition to reflect social constructs of being a 'woman' from marrying another woman. In contrast, Article 45(2) of the Constitution may be construed to allow a lesbian transwoman to marry another woman because her documents and appearance would present her as 'man.' In effect, a narrow approach to Article 45(2) of the Constitution would subject the lesbian transsexual woman to overlapping forms of discrimination on *sex, gender, sexual orientation and perhaps, wealth status*. Secondly, it directly discriminates against non-heterosexual couples and relegates them to a sub-human status. Third, it also discriminates against those in women-women marriages existing in Kenyan communities. Finally, it breeds substantive discrimination that reifies stigma, prejudice and negative stereotypes against non-heteronormativity.

[24] S Atrey 'Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation' (2021) 21 *International Journal of Discrimination and the Law* 168.

4.3.4 Decoloniality and developing indigenous jurisprudence

In the post-2010 dispensation, Kenya sought to decolonise its jurisprudence. It sanctioned the Supreme Court to 'develop rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth.'[25] Mutunga urges courts to adopt decoloniality theory to decolonise jurisprudence.[26] Chapter Three presented historicisation and decoloniality notions as inclusive interpretative tools. As illustrated by the Johar case, decoloniality critiques previously colonised British territories and now the independent democratic states for clinging to colonial anti-sodomy laws that have been repealed even by the colonist.[27]

The *Gitari II case* construed Article 45(2) of the Constitution to protect heterosexual marriages and family values.[28] As discussed in Chapter Two, this protectionist approach was inherited from colonialism and coloniality. Scientific research has demystified some misconceptions underpinning the protectionist approach in the following ways:[29] First, the research found no evidence supporting the claim that same-sex orientation is 'acquired' through 'social contagion.' Secondly, the research found considerable evidence suggesting that the prejudices, including through criminalisation, against sexual minorities subject them the physical and mental health consequences. Thirdly, the research found no evidence suggesting same-sex orientation poses threats of harm to individuals, communities or vulnerable populations. Finally, whilst no evidence suggested that sexual minorities are predisposed to abuse children and young persons,

[25] The Supreme Court Act, section 3(c).
[26] W Mutunga 'A new constitution: Willy Mutunga on the culmination of almost five decades of struggles' (2013) 65 *Haldane Society of Socialist Lawyers* 20.
[27] *Navtej Singh Johar v Union of India* (2018) 276-282.
[28] n 1 above, paras 397, 402 -405.
[29] Academy of Science of South Africa *Diversity in Human Sexuality: Implications for Policy in Africa* 2015.

the research found that the majority of child abusers are heterosexual persons. In my opinion, these research findings debunk the colonial construction of sodomy as an infection, contamination and pollution reflected in the *Gitari II decision*.

A decoloniality interpretative approach can also counter the state control over people's private spaces, including their bodies and marriages. Kenya seems to have inherited the colonial practice of treating marriages as a governance project.[30]A decolonial approach limits the state's interference to familial or marital relationships only to protect the vulnerable, such as children or persons with intellectual disabilities.

4.3.5 Counter-majoritarianism

This research avers that a counter-majoritarian interpretative approach is significant in construing Article 45(2) of the Constitution in two ways. First, Article 45(2) of the Constitution must confront the questions of whether sexual minorities exist, and whether criminalising their conduct can make them disappear. After appreciating the existence of sexual minorities as well as the fact that women-to-women marriages are part of some Kenyan communities, the provision ought to be construed in a manner that protects them as opposed to prohibiting or criminalising the same sexual conduct and unions. Secondly, interpretations on Article 45(2) of the Constitution should appreciate its history of contention and compromise. In this context, the counter-majoritarian interpretative approach emancipates the silenced voices of sexual minorities and protects them by construing Article 45(2) as non-prohibitive of same sexual conduct and unions.

[30] SW Kang'ara 'Beyond bed and bread. making the African state through marriage law reform - constitutive and transformative influences of Anglo-American legal thought' (2012) 9 *Hastings Race & Poverty Law Journal* 353.

4.3.6 Multidisciplinary approach

Chapter Three found that a multi-disciplinary approach invokes non-legal phenomena such as socio-economic and political considerations as well as academic works in judicial decision making. Using it as an inclusive interpretative approach on Article 45(2) of the Constitution, a multidisciplinary approach could protect sexual minorities in three-fold. First, it could consider and introduce research findings from anthropology, science and sociology studies on sex and sexualities to distinguish between consensual same sex from incest, bestiality, defilement and rape as well as demonstrate that same sex activities and marriages predate colonialism in Kenya. Secondly, it can deconstruct the linear historicisation and revisionism of Article 45(2) of the Constitution, and re-construct it through a comprehensive analysis of constitution-making history. Finally, it can introduce nuanced linguistic and social contexts to Article 45(2) of the Constitution which could suggest that family protection is not same as marriage protection. Families being inclusive and flexible which would include heteronormative or non-heteronormative unions, cannot be reduced to sex and thus, be criminalised on that basis.

4.3.7 The constitution speaks approach

This approach is encapsulated in the interpretative framework of the constitution of Kenya.[31] Chapter three presented it as interpreting legal texts in contemporary contexts while accommodating prevailing circumstances unforeseen during drafting. This approach departs from the originalist interpretations that search for the original meaning of words during drafting. Although historicising the meaning might be inevitable, the courts should conform legal texts to the prevailing context. Some studies have

[31] Constitution (n 17) Article 259(3).

illuminated the presence of diverse sexualities in contemporary society, including non-normative sexualities.[32] About 38.2% of households in Kenya are single-parent families.[33] These households could be divorced, co-parenting or cohabitation families. The contemporary Kenyan marital and familial arrangements, thus, are relatively mosaic compared to the past. Article 45(2) of the Constitution is required to 'speak' to these modern societal dynamics. Assuming Article 45(2) of the Constitution neither contemplated these social dynamics on relationships nor did they exist, this approach would invite courts to interpret it in a manner that is speaking to the contemporary realities. As a living document, the constitution must breathe life into the constitutional silence and ambiguities of Article 45(2) so as not to outlaw or prohibit non-heteronormative sexual activities and unions, including to decriminalise anti-sodomy laws.

4.3.8 Constitutional conformity approach

This approach as discussed in chapter three sieves out statutory ambiguities to bring it in conformity to the constitution. In that context, sections 162-165 of the Constitution can be reviewed to eliminate aspects that do not conform to the constitution and retain the others. Using a constitutional-conformity approach could annul the penal aspects that criminalise consensual same sex between adults in private. Those penal aspects criminalising same sex activities without consent, with minors or in public can remain intact. India's Supreme Court took this approach.[34]

[32] S Tamale (ed) *African sexualities: A reader* (2011).
[33] KNBS *The Kenya Population and Housing Census* 2020.
[34] n 27 above.

4.3.9 Comparative jurisprudence

As applied in the sampled decisions in chapter three, the jurisprudence from comparative jurisdictions on Article 45(2) of the Constitution could augment decriminalisation of anti-sodomy laws. The provision expressly recognises opposite-sex marriages. I find this provision as proscribing opposite-sex marriages. But it is not prohibiting same sex unions or activities. A comparative constitutional study corroborates this. Uganda's Constitution not only 'proscribes' for opposite sex marriages but also 'prohibits' same sex marriages.[35] In other words, the Kenya's Constitution adopts a '*prescribing approach*' to opposite sex marriages but avoids a '*prohibitive approach*' to same sex activities or unions. The Dominican Republic (DR)'s Constitution adopts this approach too.[36] The decision from High Court of the DR that decriminalised its anti-sodomy laws is appropriate to Kenya's context due to the similarities between their constitutional texts on family rights.[37] Similarly, Uganda's High Court decision that affirmed Anti-Homosexuality Laws is inappropriate in Kenya based on the constitutional text differences.[38]

4.4 Conclusion

The chapter set to apply the inclusive interpretative approaches on Article 45(2) of the Constitution. It applied the human rights-based approaches, constitutional morality, hierarchisation of constitutional and human rights norms, counter-majoritarianism, decoloniality and indigenising jurisprudence, constitution is speaking doctrine, constitutional-conformity and comparative jurisprudence approaches to Article 45(2) of

[35] Constitution of Uganda, Art 31.
[36] The Constitution of the Dominican Republic, Art 55.
[37] *BG v Attorney General & Others, Claim No. DOMHCV 2019/0149* (2024).
[38] *Hon. Fox Odoi-Oywelowo and 20 others, UNAIDS (amicus curiae) v Attorney General and 4 others* (2024).

the Constitution. It found that it is possible to review anti-sodomy laws using these inclusive approaches. The approaches construe Article 45(2) of the constitution so as not to prohibit or outlaw same sex activities and unions. While some infuse interrelated rights to expression, privacy, non-discrimination, dignity and health rights to the right to marry. Other approaches like counter majoritarianism and constitutional morality protect sexual minorities while grounding non-normative sexualities on constitutional values and norms as well as conforming laws criminalising them to the constitution. Still some approaches decolonise anti-sodomy laws as well as introduce modern societal dynamics, non-legal phenomenal and comparative perspectives to Article 45(2) of the Constitution to augment decriminalisation of anti-sodomy laws.

Chapter 5

Conclusion and Recommendations

5.1 Introduction

This chapter presents the research findings and recommendations on inclusive approaches to Article 45(2) of the Constitution to review anti-sodomy laws. In answering the research sub-questions in chapter one, the previous chapters have established the rationale for existing interpretations, identified inclusive approaches from comparative jurisprudence and applied them to Article 45(2) of the Constitution with positive results. Findings and recommendations are based on the discussion in the chapters. Its overriding theme is that the existing interpretative approaches to Article 45(2) of the Constitution are underpinned on the colonial and majoritarian heteronormative constructs. Transformative constitutionalism and queer theories provide an inclusive interpretative framework to review anti-sodomy laws.

5.2 Key findings

In searching for inclusive interpretations of Article 45(2) of the Constitution to review anti-sodomy laws, the research identified nine approaches based on comparative jurisprudence. Other findings also emanated from the historical contexts and theoretical framework.

5.2.1 The existing approach on Article 45(2) of the Constitution reflect colonial antecedents

Chapter two finds that Kenya's penal anti-sodomy provisions are colonial bequests grafted from the Penal Law of Queensland (Australia). The provisions were inherited with the colonial constructs of language and attitude against non-normative sexualities, based on the socio-religious antecedents.

It also finds current interpretations reinforcing colonial antecedents. First, the 'protectionist' approaches in Article 45(2) of the Constitution reflect colonial Anglo-Roman religious constructs of using anti-sodomy laws to protect themselves from moral infection, contamination, pollution, to christianise the natives as well as to curb non-procreational and non-penetrative sex. In *Gitari II case*, the High Court affirmed anti-sodomy laws because they are congruent to the 'marriage values' and 'majority views' represented in Article 45(2) of the Constitution.[1]

Finally, chapter two found that interpretations of Article 45(2) of the Constitution reflect the British State's objective of using anti-sodomy laws to control public space and the human body. Britain enacted and applied vagrancy and sodomy laws to control the 'unwanted' and 'undesired' minorities such eunuchs and transwomen from the public based on their identities.[2] The British also controlled human bodies through forensic examinations to charge those with 'funnel- shaped, shape trumpet-shaped or hair-

[1] *EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae)*.
[2] Human Rights Watch 'This alien legacy of the origins of sodomy laws in British colonialism' (2013) *Human Rights, Sexual Orientation and Gender Identity in the Commonwealth* 83.

shaven' anuses, as this was seen as an indication that they were habitual sodomites. The High Court's *COL decision* took this approach.[3]

5.2.2 Transformative constitutionalism and queer theories anchor inclusive approaches

Chapter Three found that charter-inclusive approaches decriminalising anti-sodomy laws from the sampled international and regional comparative jurisprudence were inspired by the transformative and queer ideals of charter-based values, broadmindedness, tolerance and diversity. For instance, the ECtHR declared anti-laws null because their moral restrictions failed to reflect tolerance and broadmindedness;[4] public disapprovals could not justify interference in private sexual activities;[5] and predicating minority rights upon majoritarian acceptance was incompatible with the charter-based values.[6] The HRC also reasoned that the limitations to protect morals must be based on broad principles as opposed to a single tradition.[7]

Chapter three also found that the sampled comparative jurisprudence from national courts on inclusive constitutional interpretative approaches is grounded on transformative constitutionalism tenets such as counter-majoritarianism and liberal rights interpretation, diversity and pluralism, constitutional morality, substantive equality and historical consciousness, and queer theory's disruptive notions against heteronormativity and binary sexualities. Three examples suffice. The USA Supreme Court reasoned that the majority perception of a particular practice as immoral does not

[3] *COL & another v Resident Magistrate - Kwale Court & 4 others [2016]* eKLR.

[4] *Dudgeon v United Kingdom* Application no. 7525/76 (1981).
[5] *Norris v Ireland* Application no. 10581/83 (1989).
[6] *Bayev & others v Russia applications nos. 67667/09, 44092/12 and 56717/12 (2017).*
[7] *Toonen v Australia, Communication No. 488/1992 (1994).*

justify its criminalisation.[8] South Africa's Constitutional Court also relied on transformative constitutionalism to address past effects of discrimination, as well as constitutional pluralism and morality to accommodate marginalised sexual minorities.[9] Finally, India's Supreme Court also applied transformative constitutionalism, decoloniality and constitutional morality to review its anti-sodomy provision.[10]

In contrast to the sampled comparative jurisprudence, Chapter three found the existing interpretations on Article 45(2) of the Constitution deviating from transformative constitutionalism and queer frames. The High Court still reinforced the protective coloniality-based approaches in Article 45 of the Constitution to protect family values.[11] The approach negates the transformative constitutionalism and queer tenets of multiculturalism, historical consciousness and decoloniality as well as commitment to substantive equality to protect sexual minorities from past discriminative effects or violative right threats.

5.2.3 Inclusive interpretation of the Constitution's Article 45(2) reviews anti-sodomy laws

Chapter four found that Article 45(2) of the Constitution creates a constitutional silence. It does not prohibit, outlaw and prescribe against non-heteronormative unions. Neither does it explicitly permit them. It is silent. Within the transformative constitutionalism and

[8] *Lawrence v Texas 539 U.S. 558 (2003).*
[9] *NCGLE and Another v minister of justice and others 1999 1 SA 6 (CC) 21.*
[10] *Navtej Singh Johar v Union of India 2018 (10) SCC 1.*

[11] n 1 above.

queer auspices, the provision can be construed to protect sexual minority rights and augment decriminalisation of anti-sodomy laws in the following ways.

First, the human rights-based approaches (HRBA) appreciate the right to marriage between consenting opposite sex adults in the context of other interrelated rights. It construes Article 45(2) of the Constitution to review anti-sodomy laws to promote sexual minorities' interrelated rights to equality, non-discrimination, agency, self-determination dignity and privacy. It also frames these rights from maximalist perspectives and constricts the claw-back to these rights through Article 45(2) of the Constitution.

Secondly, the constitutional morality approach resolves the constitutional silences on Article 45(2) of the Constitution by introducing the constitutional norms and values such as equality, dignity, inclusivity and non-discrimination, liberty, plurality, non-marginalisation as opposed to social and public morality to protect sexual minorities.

Thirdly, the hierarchisation of the constitutional and human rights norms elevates non-discrimination, equality, dignity and autonomy norms over the right to marry persons of the opposite sex. In this sense, it construes Article 45(2) of the Constitution as neither outlawing nor prohibiting non-normative unions and conduct.

Fourth, the decoloniality approach deconstructs the colonial notions of social contagion that breed the protectionist interpretative approaches on 45(2) of the Constitution that affirm anti-sodomy laws so as to protect the society from 'infection, contamination and pollution.' It develops indigenous jurisprudence that responds to the needs of Kenyans, including sexual minorities.

Fifth, the counter-majoritarianism approach construes Article 45(2) of the Constitution as non-prohibitive to same sex conduct and unions not only to emancipate sexual minorities from heteronormative majoritarianism but also to exhume their silenced voices which were stifled during the constitutional making process and negotiations.

Sixth, the multidisciplinary approach introduces non-legal phenomenon and academic research dimensions to not only deconstruct the selective historicisation of Article 45(2) of the Constitution that subsumes sexual minority voices but also delink consensual same sex between adults from pedophilia and bestiality in ant-sodomy laws.

Seventh, 'the constitutional is speaking' approach interprets Article 45(2) of the Constitution so as not to prohibit same-sex conduct and unions based on the contemporary diverse sexualities and non-heteronormative familial arrangements in the society.

Eight, the constitutional-conforming approach enables courts to annul anti-sodomy provisions that criminalise adult consensual same-sex activities in private, while leaving the rest of the section intact to charge pedophiles and rapists.

Finally, the comparative jurisprudence approach provides the repertoire for courts to draw interpretative lessons as well as the parameters to use decisions from comparative jurisdictions to decriminalise anti-sodomy laws.

5.3 Recommendations

The above findings necessitate this research to make the following three-prong recommendations on the subject.

5.3.1 Embracing the decoloniality notion

To eliminate the veneer of coloniality underpinning Article 45(2) of the Constitution and anti-sodomy laws, it is imperative for the courts to adopt the decoloniality notion. Decoloniality not only critiques the colonial knowledge, power and influence reinforced in the laws and policies but also deconstructs the colonial Anglo-Saxon British framing of non-normative sexualities as social contagion through moral infection, contamination and pollution as well the present Euro-America-centric notions of monogamous heteronormative marriages, with two children.

5.3.2 Lessons from comparative jurisprudence

The research recommends that courts draw lessons from the jurisprudential repertoire that has decriminalised anti-sodomy laws. However, as Mutunga reasons correctly,[12] the courts must neither be mechanical in approaching such jurisprudence nor be insular and inward-looking. They should grow indigenous jurisprudence out of Kenya's needs, appreciate its historical context and learn from other countries, without uncritical deference to them. The courts should aim to develop progressive jurisprudence that commands respect in distinguished jurisdictions while appreciating that our constitutional values are drawn from all over the world.

5.3.3 Embracing judicial activism

The research recommends judicial activism in interpreting Article 45(2) of the Constitution to review anti-sodomy laws. Judicial restraint and deference cannot

[12] W Mutunga 'Developing progressive African jurisprudence: reflections from Kenya's 2010 transformative constitution' (2017) *Lameck Goma Annual Lecture.*

promote its transformative constitutionalism that protects sexual minorities from marginalisation.

5.4 Conclusion

The research set out to explore the proper interpretative approaches on Article 45(2) of the Constitution to decriminalize anti-sodomy laws. Chapter one provided the background statement detailing the challenges confronting non-heterosexual persons and how the Constitution and Penal Code instrumentalised heteronormativity. In this context, the research problematised Article 45(2) of the Constitution while outlining its objectives, questions and significance before concluding with the literature review.

Chapter two discussed how transformative constitutionalism and queer theories can inform interpretative inclusive approaches to Article 45(2) of the Constitution to decriminalise anti-sodomy laws. It also excavated the colonial antecedents that underpin anti-sodomy laws and existing approaches. Chapter three presented the international, regional and national comparative jurisprudence that decriminalised ant-sodomy laws and contrasted it with the current interpretative approaches that deviate from transformative constitutionalism and queer theories. Chapter four applied inclusive interpretative approaches to Article 45 of the Constitution to review anti-sodomy laws. This chapter concludes with findings and recommendations.

The research establishes that Article 45(2) of the Constitution can be construed using inclusive interpretative approaches within transformative constitutionalism and queer frameworks as non-prohibiting to same sex activities and unions.

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